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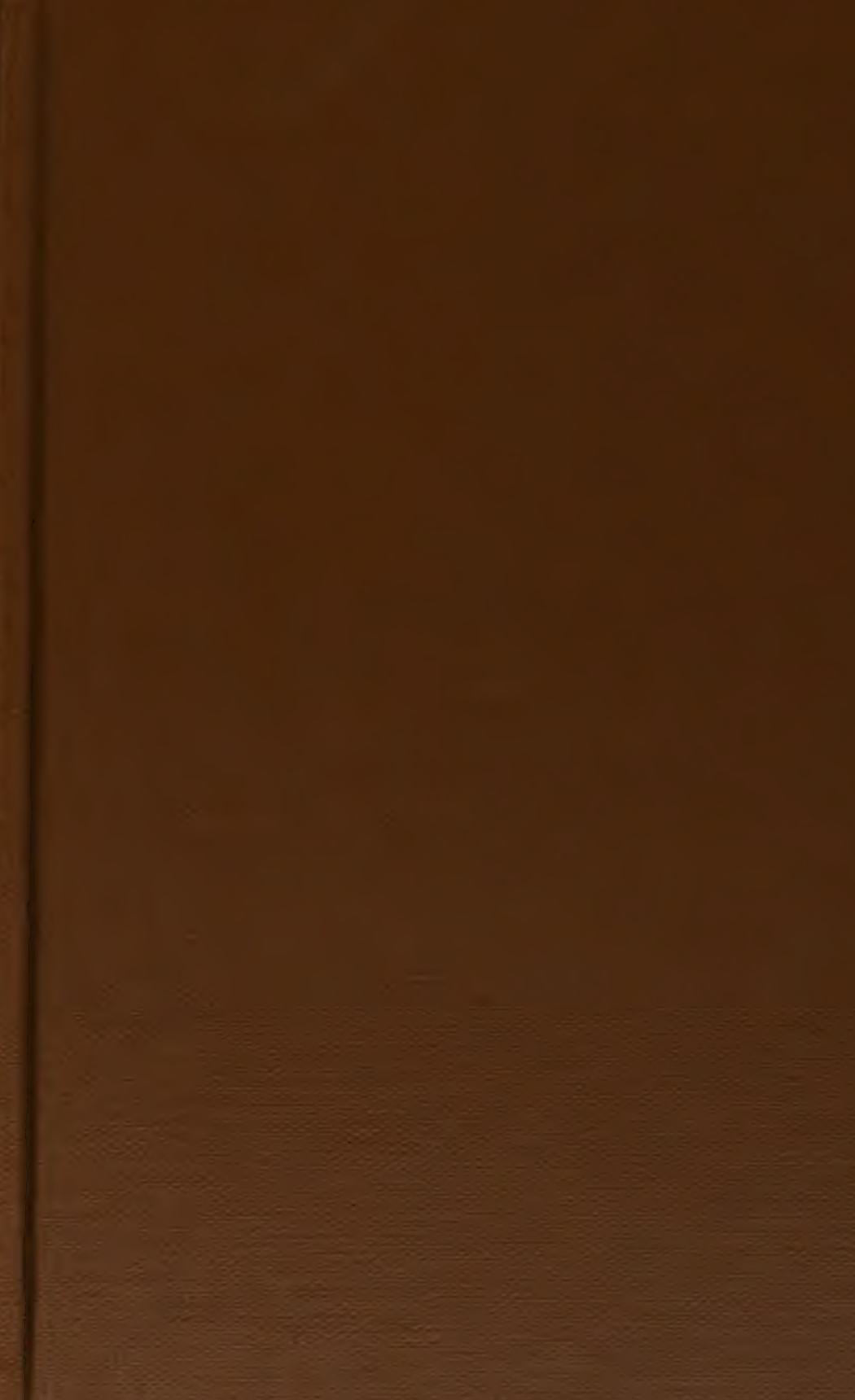
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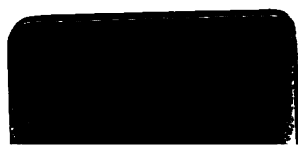
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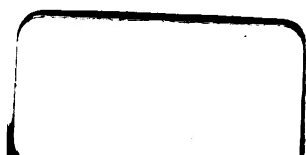
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH;

WITH
TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY EDWARD HYDE EAST, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

Si quid novisti rectius istis,
Candidus imperti: si non, his utere mecum.—HON.

SIXTEEN VOLUMES IN EIGHT.

VOLUME I.

EMBRACING VOLS. I. AND II. OF FORMER EDITIONS,

AND CONTAINING

THE CASES OF MICHAELMAS, HILARY, EASTER AND TRINITY TERMS IN THE
FORTY-FIRST, AND OF MICHAELMAS, HILARY, EASTER AND TRINITY TERMS
IN THE FORTY-SECOND YEAR OF GEORGE III....1800-1-2.

SECOND AMERICAN EDITION,
WITH THE ADDITION OF NOTES AND REFERENCES.

BY G. M. WHARTON.

PHILADELPHIA:
LEA AND BLANCHARD.

1845.

pressing two into one throughout, but the whole of the original reports will be found entire.

At the head of every case is given the original volume and paging which it occupies in the English edition; and in all references from one case to another in the volumes this paging has been retained. In the present edition the tables of cases and indexes of two volumes of former editions have been merged into one, so as to lessen the trouble of referring to each separately.

The plan thus adopted will save much confusion and labour in all future citations and references to this edition; while references to former editions are at the same time indicated by the retention of the original paging and volumes at the head of each case.

G. M. W.

PHILADELPHIA, *October*, 1845.

AUTHOR'S ADVERTISEMENT.

IN compliance with a desire very generally expressed by the Profession, the TERM REPORTS will in future be published in *Octavo*. And as the Author has been deprived of the assistance of his valuable and much respected Colleague, with whom his labours have been so long shared, he deems it proper to commence a *New Series*, of which these Reports will constitute the First Part.

ADELPHI TERRACE,
Michaelmas Term, 1800.



JUDGES
OF THE
COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

LLOYD Lord KENYON, Lord Chief Justice; succeeded by

EDWARD Lord ELLENBOROUGH, Lord Chief Justice.

Sir NASH GROSE, Kn't.

Sir SOULDEN LAWRENCE, Kn't.

Sir SIMON LE BLANC, Kn't.

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The Honourable SPENCER PERCEVAL.

THOMAS MANNERS SUTTON, Esq.



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CASES

IN

MICHAELMAS TERM,

IN THE FORTY-FIRST YEAR OF THE REIGN OF GEORGE III.

Jones v. Brinley.

1 East, 1. Nov. 8, 1800.

An agreement to pay a per centage upon the day on which any money should be received by the defendant through the means of the plaintiff's information does not entitle the plaintiff to the stipulated reward upon the transfer of stock in consequence of such information, although he might afterwards receive the dividends thereon.

THE plaintiff declared upon a special agreement, that in consideration that he had stated to the defendant that it was in his, (the plaintiff's) power to give the defendant certain information which might enable one *F. N.* to receive a considerable sum of money then due to him, and also in consideration that the plaintiff at the request of the defendant would give such information to the defendant might enable the said *F. N.* to receive the said sum, the defendant undertook and promised the plaintiff to pay him on the day upon which any money should be received by *F. N.* or by the defendant on *F. N.*'s behalf through the means of the plaintiff's information, the sum of 10*l.* per cent. on the money so received. The declaration then averred that the plaintiff did give the defendant certain information respecting divers sums of money which *F. N.* was entitled to receive under and by virtue of the last will and testament of one *A. N.* deceased, and that *F. N.* through the means of such information on the 27th *January* 1800, did receive the sum of 500*l.* whereby the defendant by virtue of his promise became liable to pay to the plaintiff 50*l.* &c. The second count stated more generally, that the defendant was indebted to the plaintiff in so much for certain information given by the plaintiff to the defendant at his request, whereby *F. N.* was enabled to receive, and did accordingly receive divers large sums before then due to him, and being so indebted the defendant promised, &c. There were also the general money counts and for work and labour. The defendant pleaded the general issue.

At the trial before Lord *Kenyon* at the last sittings at Guildhall, the agreement in writing was proved, whereby the defendant "undertook to pay to the plaintiff on the day upon which any money should be received by *F. N.* or by him (the defendant,) on his behalf, through the means of the plaintiff's information, the sum of 10*l.* per cent. on the money which should be so received." It was also proved that, in consequence of information given by the plaintiff to the defendant, *F. N.* had obtained 500*l.* stock, which had stood in the name of *A. N.*, from whom the defendant derived title as residuary legatee: and evidence was adduced for the purpose of shewing that he had after-

wards received ten years dividends due thereon. It was objected by the defendant's counsel, that it was *stock* and not *money* which had been obtained through the medium of the plaintiff's information, and therefore he was not entitled to recover any thing under the terms of the agreement; and that the dividends were merely consequential to the stock: and it was not the meaning of the parties that 10*l.* per cent. should be paid upon all the interest which might accrue, but merely for the principal sum, if any. Lord *Kenyon* admitted the objection and nonsuited the plaintiff.

Comyn, after stating the facts as abovementioned, now moved to set aside the non-suit, contending that the proof sustained the agreement; for stock was to be estimated as so much money, into which it was convertible; and that at any rate, the receipt of the dividends(*a*) due at the time of the transfer of the stock was a receipt of so much money within the meaning of the agreement. But

The Court thought the objection well founded; and animadverted upon the immorality of such bargains as the one in question, which had grown of late into practice.

Rule refused(*b*).

Sweet and Another Assignees of Gard, a Bankrupt, v. Pym.

1 East, 4. Nov. 10, 1800.

One who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account and at the risk of his principal though unknown to the carrier, cannot recover his lien by stopping the goods in transitu, and procuring them to be redelivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage.

IN trover for certain bales of cloth the facts appeared to be these. The bankrupt, a clothier residing in *London*, before his bankruptcy, employed the defendant, a fuller residing in *Exeter*, in his business; and at the time of the transaction after mentioned the bankrupt was indebted to the defendant upon the general balance of accounts in more money than the value of the goods in question: and by the custom of the trade at *Exeter* the defendant had a lien for his general balance. The cloths for which the action was brought had been sent by *Gard* before his bankruptcy to the defendant to be fulled as usual; and after they were finished the defendant, in consequence of prior orders from *Gard*, shipped them on board a certain vessel at *Exeter* to be forwarded to him in *London*, and sent the invoice to *Gard*. No bill of lading was signed by the captain at the time of the shipment; but soon after the vessel sailed, *Pym*, hearing of *Gard's* bankruptcy, followed and overtook the captain off *Deal* in his passage to *London*, and there procured him to sign a bill of lading to *Pym* or his order, by virtue of which *Pym* obtained the delivery of the goods on their arrival in *London*.

At the trial before Lord *Eldon* at the last assizes for the city of *Exeter*, the plaintiffs recovered a verdict under his Lordship's direction, he being of opinion that no person having a lien on goods, can if he part with the possession afterwards stop them *in transitu*, and thereby revive his lien against

(*a*) This fact was offered to be more fully supplied by affidavit; but the Court thought this was not a case in which the plaintiff should be allowed to bring forward any fact that had not distinctly appeared at the trial: and therefore *quære* as to the opinion on this point.

(*b*) An action for money had and received does not lie to recover stock. *Nightingal* and others assignees of *Mettivier v. Devisme*, 5 Burr. 2589. and 2 Black. Rep. 682. Lord *Mansfield* said "It is a new species of property, and is not money." [In *The King v. The Churchwardens, &c. of St. John Middermarket*, 6 East, 182. it was held that government stock is not money at interest.]

the owner. But he gave the defendant's counsel leave to move this Court to enter a non-suit, if they should be of a different opinion.

Gibbs now moved accordingly on the ground that the captain having received the goods from the defendant, and not being accountable to any other person for the delivery of them, (for he had received no orders from *Gard*), it was the same as if they had remained in the actual possession of the defendant. That there could have been no doubt if the defendant had taken the bill of lading to his own order at first; and his taking it afterwards before the goods got to the possession of *Gard* was the same thing. It was equally an acknowledgment by the captain that he held the custody of them on the defendant's account.

LORD KENYON, C. J. The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. Here the goods were shipped by the order and on account of the bankrupt, and he was to pay the expence of the carriage of them to *London*: the custody therefore was changed by the delivery to the captain. In the case of *Kinloch v. Craig*(a) where I had the misfortune to differ with my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession; but the contrary was ruled by this Court, and afterwards in the House of Lords: though there the factor had accepted bills on the faith of the consignments, and had paid part of the freight after the goods arrived.

GRANGE, J.—I consider the delivery of the goods by *Pym* to the captain to be equivalent to a delivery to *Gard*.(1)

Per Curiam,

Rule refused.

Smith and Another v. Buchanan and Another.

1 East, 6. Nov. 11, 1800.

A discharge under a commission of bankrupt in a foreign country is no bar to an action for a debt arising here against the bankrupt by a creditor a subject of this country.

ASSUMPSIT for goods sold and delivered, and upon the common money counts. Pleas, 1. *non-assumpsit*, 2. for a further plea in discharge of the person's estate and effects of the defendants, except any property, if any there be, after the date of a certain deed dated 23d of September 1799 after mentioned, acquired or to be acquired by the defendants, by descent, devise, bequest or in course of distribution, they say, that by a certain law of the state of *Maryland*, made on the 10th of April 1787, intituled "an act respecting insolvent debtors," it was enacted, that any debtor for any sum above 300*l*. might apply by petition to the chancellor of the said state, and offer to deliver up all his property to his creditors, a schedule whereof with a list of creditors should be exhibited therewith; and thereupon the chancellor might direct personal notice of such application to be given to the creditors or as many as could be served therewith, or he might direct the notice to be published in the newspapers; and on the appearance of the creditors, or their neglect to appear on

(a) 3 Term Rep. 119. afterwards in Dom. Proc. ib. 786. [S. C. 4 Bro. Parl. Ca. 47. Toml. edit.]

(1) That a delivery of goods to a carrier is equivalent to a delivery to the person ordering them, see a case cited in *Godfrey v. Furze*, 3 P. Wms. 186. *Vale v. Bayle*, Cowp. 294. *Daves v. Peck*, 8 Term Rep. 530. *Dutton v. Solomonson*, 3 Bos. & Pal. 584. *Whiting v. Farrand*, 1 Conn. Rep. 60. In *McCombie v. Davies*, 7 East, 5, the doctrine that the right of lien cannot be extended beyond the time of actual possession was again recognized, with this exception, viz. where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession as his servant for the preservation of his lien. Vide *Clemson v. Davidson & al.* 5 Binn 392.

[See also *Bolin v. Huffnagle*, 1 Rawle, 9.—W.]

due notice, the chancellor might administer an oath to the debtor binding himself to deliver up and transfer to his creditors all his property, &c. in such manner as the chancellor should direct; and that the chancellor should thereupon appoint a trustee on behalf of the creditors, and should direct such debtor to execute a deed to such trustee of all his property, rights and claims in trust for the creditors; "and thereupon, and upon the execution of the said deed, and after the delivery of the property, books, bonds, and other evidences of debts to such trustee, and his certificate of such delivery, *the chancellor might order that such debtor should for ever thereafter be acquitted and discharged from all debts by him owing or contracted at any time before the date of such deed;*" and in virtue of such order *such debtor should be for ever so discharged: provided*, that any property thereafter acquired by such debtor by descent, devise, bequest or in course of distribution should be liable to the payment of his debts. The plea further stated, that after the making of that law the defendants were joint debtors for more than 300*l.*; that they petitioned the chancellor and offered to deliver up all their property to the use of their creditors with the schedule and list of creditors thereunto annexed; that thereupon the chancellor gave the due notice to the creditors, and administered the oath to the defendants; and appointed one *S. Moale* trustee on behalf of the creditors; and directed the defendants to execute a deed to the said *S. M.* for all their property, debts, rights and claims, &c. in trust for their creditors. That thereupon the defendants did accordingly, on the 23d September 1799, execute such deed of that date, and did then deliver up to the said *S. M.* as such trustee, &c. all their property, books, &c. who thereupon certified such delivery to the said chancellor; and thereupon the chancellor, according to the said act, *ordered that the defendants should for ever thereafter be acquitted and discharged from all debts by them owing or contracted before the date of the said deed*; except that any property thereafter acquired by them by descent, &c. should be liable to the payment of their debts. The defendants then averred, that they, at the time when the several causes of action in the declaration mentioned accrued, and until and at the time of the said order of discharge, were inhabitants and residents in the State of *Maryland*, and that the said several causes of action accrued and were owing before the date of the said deed of trust executed by the said defendants to *S. M.*; wherefore they prayed judgment, and that their persons, estates and effects, save and except any property, if any, acquired after the date of the said deed by the defendants by descent, &c. may be discharged, &c. A third plea contained the same facts, together with an averment, that the defendants had not since the date of the trust deed acquired any property by descent, &c. and concluded in bar of the action generally. Replication that *the causes of action* in the declaration mentioned severally *accrued to the plaintiffs within this kingdom of England*: to which there was a general demurrer and joinder.

Giles in support of the demurrer. The order of discharge obtained by the defendants under the law of the State of *Maryland* is analogous and equivalent to the certificate of a bankrupt here; and having been issued by a competent jurisdiction in the case of subjects of that State resident there at the time, though it has not the binding force of a law in this country, yet the courts here will take cognizance of and give it effect by adoption and the courtesy of nations. Our courts recognize the laws of a foreign state in many instances. The *lex loci* governs the constructions of contracts^(a): and the distribution of intestate's effects depends on his domicile at the time of his death, though he had property in other countries. Even in the instance in question of bankruptcy, it is in every day's practice that actions are sustained by assignees and trustees under foreign commissions of bankrupt against debtors of the bankrupts residing here; which shews that the law recognizes the

(a) Vide *Burrows v. Jemino*, 2 Stra. 733.

alteration of the property. But it would be inconsistent and unjust to give effect to so much of the law as divests the property out of the bankrupt, and deny him the benefit of the condition on which it was so divested, namely, indemnity against antecedent claims. If it be true that our courts will give credence to the judicial acts of a foreign state in matters over which they had a competent jurisdiction by the laws of that state, it follows that neither the locality of the contract nor the country of the contracting parties can vary the case. It is clear, that this order would have been a discharge of the defendants if the plaintiffs had instituted their suit in *America*; and it would have been no answer that the contract was made in *England*, or that the plaintiffs were subjects of *England*, and not bound by the laws of *Maryland* in regard to bankrupts. It is also clear, that after the proceedings which took place in *America* it would have been an answer to a suit instituted here by the bankrupts against a debtor that their property was divested by such proceedings. Then in justice they are entitled to avail themselves of the same law for their protection against the suit of a creditor: more especially as the order of discharge was grounded on a good consideration, namely the surrender by the defendants of the whole of their property for the use of their creditors. It is true, that it was holden in *Folliot v. Ogden*, 1 H. Blac. 123, that a man's having been deprived of all his property by an act of confiscation of a foreign state, which at the same time provided a fund for the payment of his debts there, was no answer at law to a suit by a creditor here. But that went on the ground that no nation will take cognizance of the laws of forfeiture of another. And in *Wright v. Nutt*, 1 H. Blac. 136, those circumstances were holden to be sufficient grounds for a court of equity to interpose by injunction against the suit of the creditor. In the former case, several cases (a) in Chancery were cited and approved to shew that our courts recognized the bankrupt laws of a foreign state, so as to vest debts due in *England* to a bankrupt in his curators or assignees in the foreign country. The case however of *Ballantine v. Golding*, M. 24 Geo. 3. B. R. Cooke's Bank. L. 347. 1st edit., comes nearest to the present, where a certificate obtained under a commission of bankrupt in *Ireland* was holden a bar to an action here against the bankrupt for a debt arising prior to the bankruptcy. It is true that the debt there was contracted in *Ireland*; but Lord Mansfield recognized it as a general principle, that what is a discharge by the law of one country will operate as a discharge in another. And he said, that he remembered a case in Chancery of a *cessio bonorum* in *Holland*, which is a discharge there, having been allowed the same effect here.

R. Smith, contra, was stopped by the Court.

Lord KENYON, C. J. It is impossible to say, that a contract made in one country is to be governed by the laws of another. It might as well be contended, that if the State of *Maryland* had enacted that no debts due from its own subjects to the subjects of *England* should be paid, the plaintiff would have been bound by it. This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce, and the only answer given is, that a law has been made in a foreign country to discharge these defendants from their debts on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country suing on a lawful contract made here? how can it be pretended that he is bound by a condition to which he has given no assent either express or implied? It is true, that we so far give effect to foreign laws of bankruptcy as that assignees of bankrupts deriving titles under foreign ordinances are permitted to sue here for debts due to the bankrupt's estates: but that is because the right to personal property must be governed by the laws of

(a) Ib. 181. in notice, viz. *Solomons v. Ross* 1764, before Bathurst, J.; *Jollet v. Deponstien*, 1769 before Lord Camden; and *Neal v. Collingham* in *Ireland*, 1764.

that country where the owner is domiciled. That was recognized in the case of *Hunter v. Potts*, 4 Term Rep. 182. 192. The Court there considered the assignment of the bankrupt's effects in another country, although in fact made *in invitum*, as equivalent here to a voluntary conveyance by him. Cook. Bank. L. 347. cites Beawes Lex Merc. 499. The case of *Ballantine v. Golding* is very distinguishable from the present; for there the debt was contracted in *Ireland* where the commission issued. But in the same page of the book (a) from whence that was quoted is to be found an opinion of Lord Talbot's directly contrary to the conclusion we are desired to draw in this case; for there he held, that through the commission of bankrupt issued here attached on the bankrupt's effects in the plantations, yet his certificate would not protect him from being sued there for a debt arising therein. The same rule then must prevail here.

LAWRENCE, J. If the defendants had made a voluntary assignment of all their property to the use of their creditors, it is not pretended that that would have been a bar to the suit of the plaintiffs; and yet the title of the assignee would have been as valid here as under the foreign commission: which shews that the validity of the title under such an assignment cannot make any difference in the present argument. Then it rests solely on the question, Whether the law of *Maryland* can take away the right of a subject of this country to sue upon a contract made here, and which is binding by our laws? This cannot be pretended: and therefore the plaintiffs are entitled to judgment.

GROSE and LE BLANC, Justices, concurring,

Judgment for the plaintiffs (b) (1) (2).

(a) See the case of *Warning v. Knight*, Sittings at Guildhall after Hil. T. 5. G. 3 cor. Lord Mansfield, where the same opinion was entertained *ib.* addenda to 1st edit.

(b) In *Pedder v. M. Master*, 8 T. Rep. 609. the Court refused to discharge a defendant out of custody who was arrested at the suit of a creditor resident here, on an allegation that the debt was contracted at *Hamburgh*, and that the defendant had become a bankrupt and obtained his certificate there, and that the plaintiff might have proved his debt under the commission: for the Court said, that as the plaintiff was not resident in *Hamburgh* at the time of the bankruptcy, they would not decide the question in a summary way, but put the defendant to plead his bankruptcy and discharge. The defendant accordingly filed such a plea, which the court held to be informally pleaded; and the matter never came on again.

(1) In *Ballantine v. Golding*, M. 24 Geo. 3. Cook's Bank. Law 515. (4th edit.) it was laid down by Lord Mansfield as a general rule, That what is a discharge of a debt in a country where it was contracted, is a discharge of it every where. The same doctrine has since been recognized in *Hunter v. Potts*, 4 Term Rep. 182. *Potter v. Brown*, 5 East 124. *Harrie v. Mandeville*, 2 Dall. 256. But a discharge under the bankrupt or insolvent law of one country, as to a debt not contracted and due to a person not resident there, will not be available in another country. *Van Raugh v. Van Arsdaln*, 8 Caines 154. *Smith v. Smith*, 2 Johns. Rep. 235. *Proctor v. Moore*, 1 Mass. Rep. 198. *Emory v. Greenough*, 3 Dall. 369. cited and observed upon by Chief Justice Tilghman, 5 Binn. 385, 6. *Greenleaf v. Banks*, stated and referred to 5 Binn. 384, 386. *Green v. Sarmiento*, Brown's Rep. 30. App. cited 5 Binn. 386.

In *Pennsylvania* the rule of reciprocity has been adopted, viz. to give the same effect to a discharge under the bankrupt or insolvent laws of another state, which the courts of that state would give to a similar discharge under the laws of *Pennsylvania*. *Smith v. Brown*, 3 Binn. 201. *Boggs v. Teackle*, 5 Binn. 382. *Walsh v. Nurse*, 5 Binn. 381.

The most numerous class of cases in which the effect of a discharge under the laws of another state has been considered, is where the debtor, being subsequently arrested, moves for an *exoneretur* to be entered on the bail-piece. In deciding upon these applications the courts in this country have not been uniformly governed by the same principle.

In *New-York* it has been settled, that the creditor is in all cases entitled to the remedy provided by the laws of that state; and upon that ground the motion has always been denied. *Smith v. Spinolla*, 2 Johns. Rep. 198. *Sicard v. Whale*, 11 Johns. Rep. 194. It results as a necessary consequence of this doctrine, that if the discharge goes only to protect the body of the debtor from arrest, it can have no effect whatever in another state. It cannot operate upon the process, because that is governed by the *lex loci fori*; and by its terms it is not to affect the debt. *White v. Canfield*, 7 Johns. Rep. 117.

In *Pennsylvania* the *lex loci fori* has accommodated itself more courteously to the law

The King v. The Inhabitants of Bilton with Harrowgate.

1 East, 13. Nov. 12, 1806.

The examination of a soldier touching his settlement, which is made evidence by the Mutiny Act, must be authenticated before it can be received in evidence, and does not prove itself *prima facie*, though the paper appear to be in the form prescribed by the statute.

ON an appeal to the quarter sessions for the West Riding of Yorkshire against an order of two Justices, removing *Grace Barber*, the wife of *Henry Barber*, a private soldier in the fifth battalion of Royal Artillery, together with *Ann* and *Henry* their children, from the township of *Leeds* to the township of *Bilton with Harrowgate*, the sessions confirmed the order, subject to the opinion of this Court on the following case.

On hearing of the appeal, Mr. *John Atkinson*, the attorney for the respondents, produced a written paper, of which the following is a copy :

“*Durham*, to wit, The examination of *Henry Barber*, a private soldier in the 5th battalion of Royal Artillery, taken and made before us two of his majesty's justices of the peace for the said county, the 5th of *March* 1800; who on his oath saith, that some time in the beginning of the year 1777, he bound himself by indenture to *Richard Smith*, in the township of *High Harrowgate*, in the parish of *Knaresbrough* in the county of *York*, to serve him as a shoemaker for the term of seven years. That he served the whole of such term, and slept all the time in his master's house in the township of *High Harrowgate*. And saith, that he hath never since gained any other settlement. Taken and sworn the day and

year aforesaid, before us

Richard Wallis,

Robert Green.

The mark of

X

Henry Barber.”

Which paper writing so produced by the said *John Atkinson* he said that he had received from *Musgrave* the overseer of the poor of *Leeds*; but the said *Musgrave* was not produced as a witness, nor was any evidence whatsoever offered either to prove that the said *Richard Wallace* and *Robert Green* were magistrates for the said county of *Durham*; or that the signatures subscribed to the said paper writing were the signatures of the said magistrates, other

of the country where the debt was contracted and discharged. *Millar v. Hall*, 1 Dall. 229. *Thompson v. Young*, 1 Dall. 294. *Donaldson v. Chambers*, 2 Dall. 100. *Harris v. Mandeville*, 2 Dall. 256. *Hilliard & al. v. Greenleaf*, 5 Binn. 386 n. *Smith v. Brown*, 3 Binn. 201. *Boggs & al. v. Teackle*, 5 Binn. 332.

It may be proper, however, to observe, that the case of *James v. Allen*, 1 Dall. 188. decided by the court of Common Pleas in *Philadelphia* county in 1786, agrees in principle with the decisions in the state of *New-York*.*

(2) [*It is settled in Pennsylvania, that an involuntary transfer, by proceedings in bankruptcy in a foreign state, of property in Pennsylvania, will be respected, except so far as it interferes with the claims of American creditors—and foreign assignees may bring suit in the name of the bankrupt. Bankruptcy in another country operates not as an absolute assignment of the bankrupt's estate in Pennsylvania but, subject to the rights of domestic creditors, it confers on the assignee an equitable interest in the effects. *Merrick's est.* 2 Ashm. 465. *Same est.* 5 W. & S. 9. *Lowry v. Hall*, 2 do. 82. *Mulliken v. Aughinbaugh*, 1 Penn. R. 117.

In *New-York*, as above stated, a different rule has governed the courts. *Abraham v. Platoro*, 3 Wend. 535. *Willick v. Renwick*, 23 do. 65. *Johnson v. Hunt*, do. 87.

In *Massachusetts*, they have adhered to the principle which obtains in *Pennsylvania*. *Blake v. Williams*, 6 Pick. 286. *Whipple v. Thayer*, 16 do. 25. So, in *Virginia*, *Bland v. Drummond*, 1 Brockinb. C. C. R. 62.

In the state of *Louisiana*, the bankrupt discharge of a debtor protects his person and future property from liability, for all previous debts contracted in the country or state in which he was discharged, but the discharge of the debtor in *Great Britain* will not protect his person or future property from liability for a debt previously contracted in the *U. States*. *Mitchell v. McMillan*, 8 M. & R. 688.—W.]

than what appears upon the said paper. The counsel for the appellants objected to the Court receiving this evidence, which objection was over-ruled subject to the opinion of this Court.

Wood and Heywood, in support of the order of sessions, contended that the written examination produced was *prima facie* evidence of the settlement under the provisions of the Mutiny Act(a); for it was decided in *R. v. The Inhabitants of Warley*, 6 Term Rep. 534, that the original examination of a soldier touching his settlement, as well as the attested copy of it, was admissible evidence of the settlement under that act.

Lord KENYON, C. J., interfering, said, that the case was too plain for argument. That the paper in question might possibly have been good evidence if properly authenticated: but the objection here was, that the possession of it was not accounted for, or any other circumstance proved to authenticate it(b). The mere production of it in court proved nothing.

The respondent's counsel then prayed the Court to send the case down again to the sessions to be heard upon the merits. But

Lord KENYON, C. J. said, that it was their own fault in not being prepared with sufficient legal proof upon the trial of the appeal; and it would be of mischievous consequence to permit parties to go to another trial because their evidence was defective in the first instance. That the Court were bound to quash the order of sessions, which appeared to have no foundation for its support; and the consequence followed of course.

Per Curiam,

Both orders quashed.

Lambe was to have argued against the orders.

Pitt v. Thompson.

1 East, 16. Nov. 13, 1800.

The court will discharge a *feme covert* on common bail, though at the time of the credit given to her by the plaintiff she mistakenly informed him that her husband was dead; there being no fraud intended.

A RULE was obtained calling on the plaintiff to shew cause why the defendant should not be discharged out of custody on common bail in this action of assumpsit, on the ground of her being a *feme covert*. The affidavit stated the cause of action to be for the rent of a house in which she had resided for several years, and for which previous to the year 1796 the rent had been paid by her husband, who was a sea-faring man. At that period she applied to the plaintiff her landlord, and informed him that she had not heard of her husband for a long time, and believed he was dead, and desired to continue tenant of the premises, to which the plaintiff assented. And from that time

(a) § 33 enables two or more justices of the peace for the county, &c. where any non-commissioned officer or soldier shall be quartered, in case such officer or soldier has either wife or child or children, to cause such officer or soldier to be summoned before them, in the place where they are quartered, in order to make oath of the place of their last legal settlement; and such persons are directed to obey such summons, and to make oath accordingly. And such justices are thereby required to give an attested copy of such affidavit to the person making the same, to be by him delivered to his commanding officer, in order to be produced when required; which attested copy shall be at any time admitted in evidence as to such last legal settlement before any of his majesty's justices of the peace, or at any general or quarter sessions of the peace. Provided always, that in case any such officer or soldier shall be again summoned to make oath as aforesaid, then on such attested copy of the oath by him formerly taken being produced by him or by any other person on his behalf, such officer or soldier shall not be obliged to take any other or further oath, with regard to his legal settlement, but shall leave a copy of such attested copy of examination, if required.

(b) The want of proof of the hand writing of the magistrates has been before suggested at the bar as the principal objection to the admission of the evidence.

she had passed as a single woman, and had contracted as such with other persons as well as the plaintiff. But it was now sworn that her husband was living.

Best shewed cause against the rule, and referred to the cases of *Partridge v. Clark*, 5 Term Rep. 194, and *Waters v. Smith*, 6 Term Rep. 451, where the Court, in recognizing the practice of discharging married women on summary applications of this kind, qualified the rule with the exceptions, where the fact itself was doubtful, and where the credit had been obtained by the defendant by imposing herself on the plaintiff as a single woman; which latter he contended had been done in this case: and the plaintiff had no means of ascertaining the truth of the other fact sworn to. But

The Court thought that the defendant was entitled to the relief prayed, considering her as having made the representation of her husband's death to the plaintiff through mistake, and not from any intention to impose upon him. Rule absolute(a).

Lawes in support of the rule.

Jennings v. Mitchell.

1 East, 17. Nov. 14, 1800.

In an affidavit to hold to bail for 1190*l.* 11*s.* 3*d.* it is not enough to negative a tender of the said debt in bank notes; for non constat but a tender in bank notes was made of all but the fractional sum, which would be sufficient within the statute 37 Geo. 3. c. 45.

THE plaintiff held the defendant to bail for the sum of 1190*l.* 11*s.* 3*d.* and in the affidavit to hold to bail the plaintiff, after swearing to the debt to the amount stated, deposed, "that the defendant hath not made any tender or offer to pay the said sum in bank of *England* notes to the knowledge of belief of this deponent."

A rule was obtained calling on the plaintiff to shew cause why the bail bond should not be delivered up to be cancelled, and a common appearance entered for the defendant, on the ground that the tender of the debt in bank notes was not properly negatived, according to the provisions of the bank act, 37 Geo. 3. c. 45. which requires (s. 9.) that no person shall be holden to special bail, "unless the affidavit to hold to bail contain therein that no offer has been made to pay the sum of money in such affidavit mentioned, &c. in notes of the said Governor and Company expressed to be payable on demand, (*fractional parts of the sum of twenty shillings only excepted*)," &c. and non constat, according to this affidavit, but that there may have been a tender of 1190*l.* in bank notes, which would have been a compliance with the statute as nearly as the sum would admit of; and the affidavit ought to have proceeded to negative a tender of any part of the debt in bank notes. To this it was answered, that the fair construction of the affidavit was, that there was no tender of the debt in bank notes as far as it was possible to make such a tender on account of the fractional sum. But

The Court said, that the objection, which however was *stricti juris*, must prevail.

Rule absolute(1).

Giles in support of the rule.

Parnther against it.

(a) The Court granted a similar application in a case where the plaintiff at the time of the credit given to the defendant knew that she had a husband living abroad, though under terms of separation from her. *March v. Capelli*, Hil. 39 Geo. 3.

(1) Vide *Maylin v. Twenshead*, 2 East 1. *Ford v. Loeper*, 2 East 110.

Jarrett v. Dillon.

1 East, 18. Nov. 14, 1800.

The plaintiff in an affidavit to hold the defendant to bail must give himself an addition, otherwise the defendant will be discharged on common bail.

A RULE was obtained calling on the plaintiff to shew cause why a common appearance should not be entered for the defendant upon the defect of the affidavit on which he had been holden to bail, in which the plaintiff was merely described as of such a place, without giving himself any addition of state or degree. This objection was grounded on the rule of Court of Mich. 15 Car. 2. 1663. whereby "It is ordered, that the true place of abode and the true addition of every person who shall make affidavit in court here shall be inserted in such affidavit."

Erskine and *Barrow* shewed cause against the rule: 1st. because the rule only applied to an affidavit made in a cause in Court, whereas an affidavit to hold to bail was only in the nature of process to bring the party in. 2dly. It was not competent to the defendant to take any objection to any proceeding in the cause till he had appeared in Court according to the condition of the bail bond by putting in good bail; after which, if the objection were well founded, he might avail himself of it in discharge of his bail(a). But

The Court said, that the rule of Court in question had always been acted upon in this instance as well as in others; and it was important to preserve the settled form of proceedings; and that no affidavit should be received without such addition. That this had probably been required in conformity to the statute of additions 1 Hen. 6. c. 6. which made such addition necessary in all original writs of actions, personal appeals, and indictments; and in criminal cases any defect of this kind was still matter of error(b).

Rule absolute.

Lawes was to have supported the rule.

Wright v. Robert Hunter.

1 East, 20. Nov. 14, 1800.

Money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied, is proveable as a debt under the commission of the bankrupt partner; although the solvent partner were not called upon to repay the debt to the joint creditor till after the bankruptcy of the other. But the solvent partner may recover from the bankrupt his share of such debt so paid after the bankruptcy to the joint creditor, notwithstanding the bankrupt has obtained his certificate. *A.* engages as a partner in a particular transaction with *B.*, *C.*, and *D.*, who were before partners; *B.*, *C.*, and *D.*, become bankrupts, after which *A.* pays a debt due from himself and them to a joint creditor; held that these three partners constituted but one debtor to *A.*, and that he might recover from *B.* the proportion of *B.*, *C.*, and *D.*, towards the joint debt; *B.* not having pleaded in abatement.

THIS was an issue directed by his Honour the Master of the Rolls for the opinion of this Court. The action was for money paid, laid out and expended, by the plaintiff, for the defendant's use, and for money had and received

(a) In *Desborough v. Copinger*, 8 Term Rep. 77. the Court would not admit of any objection being made to the affidavit to hold to bail after judgment by default; but said, that any objection of that sort ought to be made in reasonable time after the error committed.

(b) See stat. 8 H. 6. c. 12. 5 Eliz. c. 22. and 4 Ann. c. 16. s. 7. But the advantage is waived by the plea of not guilty. 2 Hale 175. 2 Hawk. ch. 23. s. 25. ch. 25. s. 70.

by the defendant for the use of the plaintiff. The defendant pleaded, 1. the general issue; 2. a general plea of bankruptcy before the causes of action; on which issues were joined. At the trial a verdict was found for the plaintiff with damages 57*l.* 5*s.* 6*d.* subject to the opinion of the Court on the following case. The defendant together with *Margaret Hunter* and *Henry Keoven Hunter* deceased, who were copartners in equal thirds, were concerned with the plaintiff, in the year 1791, in a ship called *The Royal Charlotte*, and in the outfit of the said ship upon a slave voyage from the port of *Bristol* to the coast of *Africa*; (*viz.*) the plaintiff in six twenty-fourth shares, and the defendant and the said *M.* and *H. K. Hunter* as such copartners in eighteen twenty-fourth shares of the said ship and cargo. The defendant and *M.* and *H. K. Hunter* were also pursers or ship's husbands of the ship, and as such it was their duty to pay the charges of the outfit of the ship and cargo, and to receive from the plaintiff his part of the same. Previously to the 8th of *February* 1793, the defendant and *M.* and *H. K. Hunter* as pursers of the ship delivered to the plaintiff the accounts of all the expences of the outfit with the debit and proportion of the plaintiff in and for the same, to be paid by him to the defendant and his then partners as aforesaid according to the before mentioned share in such ship and cargo. On the 8th of *February*, the plaintiff, and the defendant for himself and his said then copartners, met and adjusted and settled the aforesaid accounts; and the plaintiff then paid to the defendant and his then partners his said 6-24th parts or proportion of the outfit, being 78*l.* 19*s.* 2*d.* On the 9th *October* 1793, the defendant and his partners became bankrupts, and a commission of bankrupt thereupon issued against them, under which the defendant has obtained his certificate. The defendant and the said *M.* and *H. K. Hunter* did not pay all the several creditors of the ship and cargo for her outfit, but at the time of their bankruptcy 1638*l.* 8*s.* 8*d.* was unpaid on account thereof, which said sum the plaintiff as such part owner was called upon to pay. After the making the original purchase by the said part owners of the ship, the defendant and the said *M.* and *H. K. Hunter* sold 11-24ths of the same ship, part of their shares in her, to Mr. *Bettington* and a person unknown, but represented by Mr. *Fowler* as his agent, (*viz.*) 3-24ths to Mr. *Bettington*, and 8-24ths to the said unknown person. This sale, however, was unknown to the plaintiff till after the bankruptcy of the defendant. The shares or parts of the said owners in the ship's unpaid debts of 1638*l.* 8*s.* 8*d.* was by a person appointed by all parties apportioned after the bankruptcy of the defendant as follows:

Mr. <i>Wright</i> the plaintiff	6-24ths of <i>l.</i> 1638	8	8	<i>l.</i> 409	12	2
Mr. <i>Bettington</i>	3-24ths of ditto			204	16	1
Mr. <i>Fowler</i> for his principal	8-24ths of ditto		-	546	2	9
The defendant <i>Margaret Hunter</i> and <i>Henry Keoven Hunter</i> bankrupts	7-24ths of ditto		-	477	17	8
				<i>l.</i> 1638	8	8

The plaintiff paid his 409*l.* 12*s.* 2*d.* for his share of the ship's debt after the defendant's bankruptcy. But there being a failure of payment of the said Messrs. *Hunters'* share of 477*l.* 17*s.* 8*d.* the same was subdivided by the same person between the other partners as follows:

Mr. <i>Wright</i> the plaintiff	6-17ths of <i>l.</i> 477	17	8	<i>l.</i> 168	13	4
Mr. <i>Bettington</i>	3-17ths of ditto			84	6	8
Mr. <i>Fowler</i>	8-17ths of ditto			224	17	8
				<i>l.</i> 477	17	8

The said several sums of 84*l.* 6*s.* 8*d.* and 224*l.* 17*s.* 8*d.* were respectively paid by the said Messrs. *Bettington* and *Fowler*, and the said sum of 168*l.* 13*s.* 4*d.* by the plaintiff, after the bankruptcy of the defendant, to the creditors of the ship, in discharge of the said sum of 477*l.* 17*s.* 8*d.* of the said Messrs. *Hunters'* part or share of the debts of the ship. All the creditors of the ship (except two to the amount of 142*l.* 3*s.* which the plaintiff paid after the bankruptcy of the defendant,) proved their debts under the commission of bankrupt against the defendant, and received dividends of 3*s.* in the pound on their debts so proved: but still the said 1638*l.* 8*s.* 8*d.* remained due as aforesaid after payment of the said dividends. The defendant and the said *M.* and *H. K. Hunter* continued in equal thirds entitled to the said ship from the time of the original engagement up to the said bankruptcy, which happened on the said 9th October 1793. The plaintiff has also sued the said *Margaret Hunter* in an action now depending on account of her share of the said ship's debts.

The question is, whether the plaintiff is entitled to recover against the defendant the sums of 409*l.* 12*s.* 2*d.* and 168*l.* 13*s.* 4*d.*, or either of them, or any part thereof, so by him paid after the defendant's bankruptcy, notwithstanding his certificate.

Espinasse, for the plaintiff, contended that he was entitled to recover both those sums on the ground that the plaintiff's right of action accrued subsequent to the defendant's bankruptcy, and the debts, not being proveable under the commission, were not barred by the certificate. 1. With respect to the sum of 409*l.* 12*s.* 2*d.* the situation of the parties is this; the plaintiff and defendant may be considered as joint owners of a ship, on account of which the defendant, in the character of a ship's husband, contracted certain debts; and previous to his bankruptcy the plaintiff paid him the whole of his contributory share towards the discharge of those debts. The defendant misapplied the money and became bankrupt, and subsequent to his bankruptcy the plaintiff was called upon in his character of part owner by the ship's creditors for the payment of part of those demands which he had before settled with the defendant, and was accordingly, compelled to pay to the creditors the sum of 409*l.* 12*s.* 2*d.* This sum then not being paid till after the bankruptcy of the defendant was not such a debt as could be proved under the commission. By the act of the 5 Geo. 2. c. 30. s. 7. none but debts owing at the time of the bankruptcy are barred by the bankrupt's certificate: and what is meant by debts is explained in a subsequent part of the same clause, namely, where the cause of action accrued before the bankruptcy. Therefore, the debt must have been such whereon an action could have been maintained before the bankruptcy; unless where by the stat. 7 Geo. 1. c. 31. liquidated debts payable at a future day certain are made proveable under the commission: that is, where the demand is *debitum, in presenti, solvendum in futuro*. Now here there was no liquidated debt due before the bankruptcy for which the plaintiff could have sued the defendant. The defendant was the principal contracting party with the ship's creditors, and responsible to them for the whole; the plaintiff's share of the debts was properly paid into the defendant's hands; nor was there any period before the bankruptcy at which the plaintiff had a right to resume the money which he had so paid. The plaintiff sustained no injury till he was afterwards called upon to repay part of the money again to the creditors. In *Snaith* and others assignees of *Parke v. Gale*, 7 Term Rep. 364. the case was, that *Parke* had lent his acceptances to *Gale* before the bankruptcy of the latter, but which were not paid till afterwards; and it was decided that *Gale* was liable for the amount notwithstanding his certificate, as for money paid to his use; and though he had given his receipt before his bankruptcy as for so much money as the acceptances amounted to: for, said the Court, there was no debt due at law from the defendant to *Parke* at the time of the bankruptcy; but it arose altogether afterwards by the payment of the acceptances. Nor could any action have been maintained upon

the acknowledgment. So here no action could have been maintained by the plaintiff before the defendant's bankruptcy for the money which had been deposited with him as his share of the ship's debts, until the plaintiff was called upon to pay the same again to the creditors after the defendant's bankruptcy, when and not before the sum originally deposited with the defendant became money had and received to the plaintiff's use. The case of the *King v. Eggington*, 1 Term Rep. 369, is in point. There it was holden that a specific sum of money received by an overseer of the poor was not such a debt as could be proved under a commission of bankrupt against him before his accounts were delivered in. For, said Lord *Mansfield*, the debt only arose upon the defendant's conversion of the money to his own use, which was not till after the bankruptcy. And by *Buller, J.* the parishioners had no cause of action against the defendant, nor could have sued him, before the bankruptcy. So here till the defendant's accounts were made up after the bankruptcy, it could not be told whether he had misapplied at all, or to what extent, the money he had received from the plaintiff for the ship's creditors; and consequently, there was no liquidated debt at the time of the bankruptcy which the plaintiff could have proved under the commission. 2. The other sum of 168*l.* 13*s.* 4*d.* arises wholly after the bankruptcy, being money paid to the use of the bankrupt after that period, as one of the several co-partners, all of whom were liable for the debt. But until one partner has actually paid the share of the others he has no right of action against them: and this it must be admitted was not till after the bankruptcy. This is like the common case of principal and surety, where it has been frequently ruled, that if the surety be called upon to pay the principal's debt after his bankruptcy, he cannot come in under the commission, and consequently is not barred by the principal's certificate. Now co-partners are in the nature of sureties for each other. In each case there is a pre-existing liability before the bankruptcy, but no cause of action arises till the surety in the one case, or the co-partner in the other, is damaged by the payment of money. *Taylor v. Mills*, Cowp. 626. *Paul v. Jones*, 1 Term Rep. 599.

W. Walton for the defendant. First, As to the sum of 409*l.* 12*s.* 2*d.*, that was the plaintiff's share of the ship's debts, adjusted and paid by him to the defendant before his bankruptcy: It was, therefore, a specific liquidated sum for which the latter was accountable at that period; and consequently, was capable of being proved as a debt under the commission if it were not applied pursuant to the authority. The plaintiff's ignorance of its misapplication before the bankruptcy cannot alter the case: the amount of the sum which had been misapplied at the time of bankruptcy was always ascertainable, and that constituted a debt from the defendant to the plaintiff: it was so much money had and received by the one to the use of the other, for which he had not accounted according to the trust reposed in him. This is not therefore like a case of special damage which cannot be liquidated till after the bankruptcy. Nor does the plaintiff declare for special damage, but for so much money had and received by the defendant to his use; the demand being commensurate with the particular sum which had been placed in the defendant's hands before the bankruptcy. Neither is it true, that the money so paid could not have been recalled by the plaintiff before that period; for a principal may always recall money out of the hands of his agent by giving him notice before he has applied it. Here the bankruptcy itself was a revocation of the authority, because the money could not be afterwards applied by the defendant. Secondly, in respect of the other sum of 168*l.* 13*s.* 4*d.* claimed by the plaintiff for the defendant's share of the ship's debts paid for him after the bankruptcy; as between the ship's creditors and each of these parties, the whole was due from the plaintiff before the bankruptcy, though as between the several partners themselves, each was only liable to contribute his proportion; therefore this sum also existed as a debt at that time, for which the plaintiff

was liable, and as such he might have proved it under the commission. The stat. 5 Geo. 2. c. 30. s. 41. makes no distinction between partnership and other debts; but all which were "contracted, due or demandable" before the bankruptcy are barred by the certificate. In the stat. 10 Ann. c. 15. s. 3. it was even thought necessary to guard the construction of similar words from being extended so far as to do away the liability of the partners of a bankrupt to answer for the joint debts of the partnership, there being no doubt but that the bankrupt partner himself, obtaining his certificate, was thereby discharged. Indeed, without this, much of the beneficial effect of a bankrupt partner's certificate would be done away; for in vain would he be liberated in the first instance from the demands of the original creditors, if upon the payment of such debts by his solvent partners afterwards he would become liable to them to the same amount. In the case of a surety, to which this has been likened, he is not the real debtor; the law, therefore, implies a promise of indemnity to him from his principal in case he shall be called upon to pay the debt. His liability, therefore, is contingent before the bankruptcy, and therefore cannot be proved as a debt under the commission, if he be not actually damnified till afterwards. It is otherwise in the case of partners, each of whom is jointly and severally liable for the whole debt in respect of those with whom they deal. In *Craven and others v. Knight and others*, 2 Chan. Rep. 226, it is said, that one partner paying more than his moiety of a partnership debt on account of the bankruptcy of the other partner may come in under the commission for the surplus beyond his proportion. It is true, it does not appear by that case whether the money were so paid before or after the bankruptcy. It follows from the nature of every partnership that there must be mutual debts and credits between the partners; these therefore may be set off against each other, and the balance is a debt proveable under the commission. Besides, it may be a question here, whether the plaintiff be not premature in his action; for this being a partnership debt, the partnership fund is in the first instance liable before resort can be had to the separate estate of each partner; and *non constat* but that the partnership fund is sufficient to answer the demand; or if not the whole at least a part of it, and then the action could only be maintained for the overplus. Till that be ascertained no promise to pay can arise in law, and none is stated to have been made in fact. This then is a new experiment to make one partner liable in an action to another, which cannot be, unless upon a balance struck. *Smith v. Barrow*, 2 T. Rep. 478. [Lord *Kenyon*, C. J. observed, that the bankruptcy had put an end to the partnership(a), and therefore no question of that sort could arise]. At any rate, supposing the action to be maintainable at all, the plaintiff can only recover one third of his demand against the present defendant; for it appears that there were two other partners concerned in this adventure who were all equally responsible with the defendant; and the law will not imply a promise by the latter to pay more than his just proportion.

Espinasse in reply. The defendant was one of three partners, all of whom were liable for this demand: if therefore he would have availed himself of the latter objection, he ought to have pleaded in abatement; and not having so done, the whole may be recovered from him, and he will have his remedy over against his co-partners for their proportions. As to the principal question; the first sum remained unliquidated till after the bankruptcy; for till then the plaintiff could not know whether all or what proportion had been applied by the defendant; nor was the plaintiff aggrieved till he was called upon after the bankruptcy to pay the money again. As to the second sum; the plaintiff's demand had no existence before the bankruptcy, nor was the defendant accountable for it to him till after that period when the money was for the first time paid by the plaintiff for his use.

(a) *Vi. Hague v. Rolleston*, 4 Burr. 2176. and *Fox v. Hanbury*, Cowp. 448.

LORD KENTON, C. J. I see no hardship in this demand. The plaintiff has been cheated, and endeavours by this action to recover back his money : If the law will give it to him, there is nothing in conscience to prevent his receiving it. The case is shortly this ; the plaintiff, together with several others, were partners in a ship, the plaintiff having a certain share to himself, and the defendant and the other partners holding the remaining shares in conjunction ; debts were incurred on the partnership account, a balance was struck, and the plaintiff paid his adjusted proportion of such debts into the hands of the defendant and the other partners, who were the managing owners, in order that it might be by them paid over to the ship's creditors ; they have not done so ; and the plaintiff has been obliged to pay the money over again to those creditors. It is plain, therefore, on which side the conscience of the case lies : But unfortunately the money was deposited by the plaintiff in the defendant's hands before the bankruptcy of the latter ; and he having since obtained his certificate, I do not see how this action can be maintained for that part of the demand amounting to 40*l.* 12*s.* 2*d.* This is like the common case where an agent receives money from his principal to pay over, which he misapplies, and afterwards becomes bankrupt : there can be no doubt but that the amount would be proveable as a debt under the commission ; for in default of the due application of it, it becomes money had and received to the use of the principal. As to the other sum in demand of 16*l.* 13*s.* 4*d.* the plaintiff is clearly entitled to recover it. The objection last started, as to the defendant's being only liable for a proportion of this sum, was not thought of before, and there is no foundation for it. As between a creditor and the partners all are liable for the whole debt, though as between the partners themselves each is only answerable for his respective share. The plaintiff here stands in the relation of a creditor to the other three partners. He has been called upon to pay a certain sum after the bankruptcy on account of their delinquency. The defendant and the two other partners formed a distinct partnership with whom the plaintiff contracted, and for whom he paid the money ; he might sue all or one of them ; and as the defendant has not pleaded in abatement, I think the whole money may be recovered from him. Upon the principal question as to this part of the demand, I cannot distinguish this from the case of a surety, who is called upon to pay money for his principal after a bankruptcy ; in which case there is no doubt but that the money may be recovered back from the principal, notwithstanding his certificate.

GROSE, J. With respect to the larger sum I at first entertained some doubt, which is now entirely removed. It was argued that before the bankruptcy it could not be told whether any or what part of it had been misapplied, and consequently it was uncertain to what amount the plaintiff could prove a debt under the commission : but in truth the plaintiff was entitled to prove the whole amount of his deposit, subject to be reduced by the bankrupt's shewing the application of any part of it, and thereby ascertaining the real balance of the account. Then it was urged, that this was no debt existing at the time of the bankruptcy, because the plaintiff could not have maintained an action against the defendant for the amount at that time, nor till he had been called upon to repay the amount to the creditors, which was after the bankruptcy. That however would depend upon circumstances. For if the defendant before his bankruptcy had been called upon to pay over the money so received by him from the plaintiff, and he had refused to do so, I think he would have been liable as for money had and received to the use of the plaintiff. Now here he could not pay it after the bankruptcy, and therefore it became a debt due to the plaintiff, and as such might have been proved under the commission. As to the lesser sum, I cannot distinguish this case from that of a co-obligor and surety, where money is paid by the surety for the principal after his bankruptcy. There is more difficulty perhaps as to the proportion for which the defendant shall be holden liable in this action ; but

considering him as one of several partners for whom money has been paid, I think he is liable to the plaintiff for the whole sum of 168*l.* 13*s.* 4*d.*

LAWRENCE, J. I think the larger sum was a debt proveable under the commission, and consequently is barred by the defendant's certificate. For when the bankruptcy happened, and the money could not be applied to the purpose for which it was deposited by the plaintiff, it became so much money had and received for his use by the defendant. The lesser sum must be governed by the case of co-obligor and surety, to which it has been justly likened; and therefore I have no doubt that the plaintiff is entitled to recover something; the only question is as to the proportion. If this can be considered as a joint debt, there will be a joint implied promise to pay it by the defendant in conjunction with the other two partners; and then the defendant not having pleaded in abatement, the whole may be recovered in this action against him alone. But on this part of the case I have some doubt remaining; and if on re-consideration I should think otherwise, in the course of the term I shall mention the matter again.

LE BLANC, J. I agree with my brethren on the principal questions. The only point on which I entertain any doubt is as to the proportion of the lesser sum which the plaintiff is entitled to recover. It occurred to me at first, that the defendant was only liable for one third; but what I have heard has altered my opinion; for considering him jointly liable with the rest of his partners for the whole, he ought to have pleaded in abatement if he wished to avail himself of this objection.

On the following day Lord *Kenyon*, C. J. said, that the Court had taken under consideration the doubt which had been thrown out the day before, whether the plaintiff should have judgment for the whole, or only for a third part of the sum of 168*l.* 13*s.* 4*d.*, and that they were all of opinion that he was entitled to recover the whole; considering that the three *Hunters*, who were partners together in the transaction, constituted but one debtor with respect to the plaintiff.

Postea to the plaintiff (a).

Doe on the Demise of Chillcott v. White.

1 East, 23. Nov. 14, 1800.

E. C. by his will, after making several pecuniary bequests, devised to *A. W.* the income of a certain cottage and her living in it if she thought proper: and to *E. W.* the half of a certain estate; and all the rest and residue of his goods, &c. and also his lands, &c. (he gave to his wife for life, with power "to give what she thought proper of her said effects" to her sisters the said *A.* and *E. W.* for their lives: and after the death of his wife and her two sisters he gave all his lands, &c. to his heir at law. Held that the widow had power to devise to her sisters the real as well as personal estate before bequeathed to her by her husband; and *A. W.* having died before the widow, that the latter might among the rest bequeath the cottage, in which *A. W.* had a life interest, to her other sister *E. W.*

EJECTMENT on the several demises of *John Chillcott*, the first of the first of *January*, 1796, and the second of the first of *January* 1800, for certain freehold lands and premises in *Elworthy Stogumber* and *Brompton Ralph* in the county of *Somerset*, called *Burge's Cottage*, *Burge's Estate*, one moiety of *Truckwell Estate*, and *Middle Whetcombe* in the possession of *Eleanor White*. The cause was tried at the summer assizes at *Wells* 1800 before Mr. *Baron Thompson*, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:

Emanuel Chillcott being seised in fee of the premises in question; and of

(a) *Vi. Smith* and another assignees of *Hague v. De Silva* and others, Cowp. 469.

the other moiety of *Truckwell Estate*, and being possessed of personalty, on the 16th of *March* 1786, made his will of that date, duly executed and attested to pass real estates, in the following words; as touching such worldly estate and effects wherewith it hath pleased God to bless me, I give and dispose of the same in manner and form following; (after giving several pecuniary legacies to his relations), "Also, I give unto *Ann White* my sister in law 20*l.* and the incomes of *Burge's Cottage*, and her living in it, if she think proper, during her natural life. Also, I give unto *Eleanor White*, 100*l.* and half of *Truckwell Estate* during her natural life. Also, I give unto *William Burge* my servant man 5*l.* All the rest and residue of my goods, chattels, rights, credits, personal and testamentary estate, and also my lands, tenements, and hereditaments, I give, devise and bequeath unto *Elizabeth Chillcott*, my dearly beloved wife, during her natural life, whom I make my sole executrix. And I do allow her the said *Elizabeth Chillcott* to give what she thinks proper of her said effects to her sisters *Eleanor White* and *Ann White* during their natural lives. And after the above lives being expired, viz. *Eliz. Chillcott*, *Eleanor White* and *Ann White*, all the lands, rights, profits, and hereditaments of *Truckwell Estate* to come to *John Chillcott* my kinsman living in *London*(a), or his male heir; if any free land, not to be sold or mortgaged on any account whatsoever, but to remain in the *Chillcott* family for land of inheritance, with two cottages, garden and orchard in the parish of *Brompton Ralph* adjoining to the aforesaid *Truckwell Estate*, called by the name of *Middle Whetcombe, Free Land*. And if no male heir lawfully begotten by the said *John Chillcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chillcott's* family, who lived at *Henrick Farm*; yielding and paying to such of the daughters of the aforesaid *Richard Chillcott* which shall be then living the sum of 100*l.* each, at the time of taking possession of the aforesaid estates." The testator died on the 24th of *May*, 1787, so seised of his several estates. *Elizabeth Chillcott* his widow, and her sisters, *Eleanor* the defendant, and *Ann White*, surviving him. The lessor of the plaintiff the said *John Chillcott* at the time of the testator's death, was and is now his heir at law. On the death of the testator, *Ann White* entered into *Burge's Cottage*, *Eleanor White* into the moiety of *Truckwell Estate*, so devised to them respectively, and *Elizabeth Chillcott* (who proved the will and took possession of all the testator's personalty) entered into the residue of the real estates. *Ann White* died on the 9th of *April* 1791, in the lifetime of *Elizabeth Chillcott*, who thereupon took possession of *Burge's Cottage*; and on the 23d of *April* 1792, made her will duly executed to pass real estates; wherein reciting the will of her husband and the power thereby given to her "to give what she thought proper of the said effects (of her husband) to her sisters *Eleanor White* and *Ann White* during their natural lives;" and reciting also the death of *Ann White*, she thereby, in pursuance of the power reserved, and of all other powers wherewith she was either in law or equity invested, gave and devised unto her sister *Eleanor White* for her life "all such goods, chattels, rights, credits personal and testamentary estate, lands, tenements and hereditaments as she was empowered under or by virtue of the said recited will of her said deceased husband to give and devise." She also devised unto her said sister *E. W.* "all the rest, residue and remainder of her goods and chattels, rights and credits, real and personal estate and effects whatsoever and wheresoever, of what nature or quality soever, subject to and charged with the payment of her debts and funeral expences." And appointed her said sister *E. W.* sole executrix, and residuary devisee. On the 25th of *December* 1795, *Elizabeth Chillcott* died, on whose death the defendant *Eleanor White* proved the will, took possession of the whole of the personalty, as well as that which was *Emanuel Chillcott's* the testator's, as

(a) To whom the testator had before given a pecuniary legacy.

that which was of *Elizabeth's* own acquiring, and entered into all the real estate which was in *Elizabeth Chillcott's* possession, and still holds the same. The question was, whether the lessor of the plaintiff was entitled to recover the whole or any part of the above premises. If the Court were of opinion he was entitled to the whole, the verdict to stand for the whole; if to part only, the verdict to stand for such part; if to none, a nonsuit to be entered.

Dampier, for the plaintiff, contended that *Elizabeth Chillcott* had no power under the will of *Emanuel Chillcott* to dispose of any part of the real property. The testator only allowed his widow to give "what she thought proper of her said effects" to her sisters for their lives; and the word *effects* will not carry land. It is usually applied only to personalty, and the testator has so applied it in his will; for at the beginning of his will he used the word *estate* with reference to his real, and the word *effects* with reference to his personal property. It may be said, that *Emanuel Chillcott* having before given both real and personal property to his widow, the words "*said effects*" must apply to both; but that is not necessarily so; and if the meaning of the will be only doubtful, the Court will construe it in favor of the heir at law. It is true, the lands, &c. are devised over to the heir at law after the decease of the two sisters as well as his widow; but he had before given to each of the sisters an interest in part of the landed estate, which is sufficient to satisfy those words. At any rate, the lessor of the plaintiff is entitled to recover *Burge's Cottage*, which the testator had given to *Ann White* for her life, and which therefore cannot be said to be any part of "*her*" (the widow's) "*said effects*" not having been before bequeathed to her; and of such part only as had been before devised to herself was the widow allowed to make any further disposition.

Tripp, contra, was stopped by the Court.

LORD KENYON, C. J. It is very plain what the testator meant. After giving a few legacies and bequests he devises all the residue of his property both real and personal of every description to his widow for her life, and then allows her to give what she thinks proper of her *said effects* to her sisters for their lives. This description must apply to the property which he had been before dealing out, amongst which *Burge's Cottage* is mentioned by name; the income of which he had given to *Ann White*, and her living in it if she thought proper(a); over all of which not before disposed of he meant to give his widow a control. And this is confirmed by the terms of the devise to the heir at law, who is not to take any thing till after the death of all the sisters.

Per Curiam,

Judgment of nonsuit to be entered(b)(1).

(a) A devise of the free use of lands will pass the interest in them. *Cook v. Gerrard*, 1 Saund. 186.

(b) So the word "*legacy*" in its ordinary signification is applied to money; but it may signify a devise of land. For Lord Mansfield, in *Brady v. Cubitt*, Dougl. 40. S. P. Per Lord Maclesfield, in *Beckley v. Newland*, 2 P. W. 182. S. P. Per Lord Camden in *Williamson v. Hurst* and others in Chan. M. 7 Geo. 3. MS. S. P. in *Hope v. Taylor*, 1 Burr. 268.

(1) Vide *Doe d. Andrew v. Lainchbury & al.*, 11 East, 290. where the word "*effects*" was held to carry real estate, such being the intention of the testator as collected from the rest of the will.

The King v. Clarke.

1 East, 38. Nov. 17, 1800.

It is no objection to relators applying for a *quo warranto* information against the defendant for exercising the office of an alderman (his election to which they had opposed), that they afterwards made no opposition to his election to the principal office of magistracy, (to which the other was a necessary qualification); or that they afterwards attended at and concurred in corporate meetings whereat he presided, or where he attended in his official character: Such application being made within the time limited by law, viz. in 4 years after the defendant's election as an alderman.

THE defendant was called upon by a rule to shew cause why an information in nature of a *quo warranto* should not be exhibited against him, to shew by what authority he claimed to be an alderman of the borough of *East Retford* in the county of *Nottingham*.

The borough consists of two bailiffs, twelve other aldermen, and an indefinite number of burgesses. And thus far the affidavits on both sides agreed to the right of election of an alderman, that the bailiffs, aldermen, and burgesses for the time being, or the greater part of them, should, upon a vacancy, elect one of two burgesses, who should be submitted to their choice by a certain select body in the corporation; but by whom that nomination was in the first instance to be made was a subject in controversy, and not material to be here considered. In general it appeared, that the election of the defendant was made under circumstances of great doubt and confusion, after the senior bailiff and many of the corporators had left the Common Hall, having just before proceeded to the election of one *Chapple* to fill the vacant office of alderman, which election however was afterwards set aside upon proceedings had against him for that purpose.

But the principal ground on which the present rule was opposed, was that of the acquiescence of the seven relators, upon whose affidavits the rule was obtained, who were burgesses of the borough; as to which the circumstances appeared to be these: The election of the defendant to the office in question took place in *July 1795*, and it was not pretended that any of the relators concurred in the act of his election, but on the contrary left the Hall after the election of *Chapple* in which they had taken a part. The affidavits against the rule then stated, that the defendant, having been at first sworn in before the junior bailiff only, had an information in nature of a *quo warranto* filed against him, to which he entered a disclaimer on that account; but afterwards in *Trinity Term 1796*, obtained a writ of *Mandamus* requiring the two bailiffs to permit him to be sworn into office before them, which was accordingly done towards the latter end of 1796; since which he had always exercised his said office. That on the 29th *September 1798*, he had been elected into the office of senior bailiff (which can only be holden by an alderman of the borough) by a majority of the bailiffs and aldermen, in whom the right of election is vested, and had served the office for one year. That the relators were at the several times of his nomination, election, and swearing in as aforesaid, respectively burgesses of and residing within the town, and well acquainted, as was believed, with all the circumstances of the defendant's nomination and election, and of his obtaining the said writ of *Mandamus*, and of the oath so administered to him before the two bailiffs; and of his being afterwards elected into and serving the office of senior bailiff; these circumstances being publicly known and discoursed of in the town and neighbourhood; and have acquiesced in all those transactions as aforesaid until the present application: and that the said relators have also attended corporate meetings and elections of junior bailiffs and aldermen, at which the defendant

was present both as alderman and senior bailiff, and that they had voted on such occasions; and that they never objected to the defendant's giving his vote as alderman on such occasions.

Gibbs and *Yates* for the defendant, having first argued upon the merits for the regularity of the election, then contended that, even admitting it to have been irregular, yet after an acquiescence for so long time on the part of the whole corporation, including the present relators, they were now estopped from objecting to it. No opposition was made to the *Mandamus* to swear in the defendant in the first instance, nor to his subsequent election to the office of senior bailiff, which can only be holden by an alderman, and which was therefore a recognition of his title as alderman. And since that appointment several elections of aldermen and others have been made without any question, all which derivative titles will be destroyed if the defendant be ousted. As before the late act of the 32 Geo. 3. c. 58. the Court often refused applications from mere lapse of time, within twenty years, which was the period of limitation at that time; so neither was that statute intended to limit the discretion of the Court in refusing applications of this sort within six years, the limitation thereby fixed. In the *Winchelsea* case^(a) when the Court by analogy to the statute of limitations in respect of ejectments, laid down the rule, "that they would not give leave to a common relator to commence a prosecution in the nature of a *quo warranto* after an acquiescence of twenty years, they observed at the same time, that though the acquiescence might be short of that period, they would not therefore grant an information, unless it appeared to be a proper case." The same rule was also fully explained in the case of *The King v. Wardroper*, M. 7 G. 3. ^(b) one of the *Winchelsea* cases. The Court there were unanimously of opinion, that the rule ought to be discharged with costs. "They admitted that no length of time will establish a right against the crown; and that if his majesty's Attorney General were to file an information on behalf of the crown, the defendant's long enjoyment would be no bar, without shewing a good title. But when the information is only by a common relator, who cannot proceed without the leave of the Court, a long acquiescence in the defendant's right may operate upon the discretion of the Court, and induce them to refuse their own leave for so stale and ill-timed a prosecution. If the Court were of course to grant every information that is asked, the stat. of *Queen Ann*, which requires the Court's leave before a relator can commence a prosecution, would be virtually repealed, and the Court deprived of the discretion reposed in them. The view of that statute was on the one hand to facilitate and speed the removal of usurping officers and pretended corporators; and on the other hand, to restrain all improper and vexatious prosecutions, by putting it in the power of the Court to refuse their leave. The stat. 4 & 6. Wil. and Mar. c. 18. has reposed in the Court the same discretionary power over criminal informations. The title of that act is an act to prevent malicious informations; and with that view it directs that the clerk of the crown shall not receive or file any informations without the express order of the Court. And though the words of that statute relate only to informations for trespasses, batteries, and other misdemeanors; yet it was holden in the case of the *King and Morgan*, Carth. 503. that under the word misdemeanors it extends to informations in the nature of a *quo warranto*: for an usurpation of an office or franchise is a misdemeanor, and liable to a fine. It is evident, therefore, that the Court have a right to use their own discretion, and to grant or refuse an application of this kind according as they shall think it expedient or not. The next consideration is, Whether upon the case now disclosed it would be proper to permit the prosecution applied for?

(a) 4 Barr. 1962, and the MS. note of Mr. Justice *Yates*, from whence the quotation was made.

(b) This was also read from Mr. Justice *Yates*'s MS.

It has been said, that this case does not reach the limitation of time which the Court have set against these applications; for it is not yet 20 years since the defendant was elected. In drawing that line the Court only meant it as a boundary they would never exceed; that is, they would in no case permit any common relator to disturb a corporator after a quiet enjoyment for twenty years. But it is not from thence to be inferred that they would grant informations wherever the enjoyment has been less than 20 years. They will still examine into the propriety of the prosecution under all its circumstances, and grant or refuse it as shall seem most expedient upon the whole." In *R. v. Daves*, and *R. v. Martin(a)*, two other of the *Winchelsea* causes, where the Court entered into the same considerations, they laid considerable stress on the circumstance, that one of the relators, though he had not originally voted for *Daves*, had afterwards voted with him at subsequent corporate assemblies; and that *Daves* had afterwards been elected mayor unanimously, and many derivative titles would be affected by the flaw in his title; and for these reasons, although the irregularity of *Daves'* title was not denied even by himself, the rule for granting the information was discharged. Mr. Justice *Yates'* opinion was noted by himself in these words. After stating all the circumstances; "In all questions of this kind one great distinction is always to be attended to, that these are applications by common relators, who having no inherent right of prosecution but by the statute of Queen *Ann*, are left to the discretion of the Court whether they shall be permitted to prosecute or not. In the exercise of this discretion the Court is not merely to consider the validity or defect of the defendant's title, but the expediency of allowing or stopping the prosecution under all its circumstances. If informations were always to be granted whenever a defective title is shewn, there would be an end of the statute, and of all discretion reposed in the Court. The Crown has indeed at all times a right to enquire into the claims of any office or franchise, and to remove the parties unless they can show a complete legal title. But if every common relator might disturb corporations whenever he pleases, the vexations and mischiefs of so unlimited a privilege would be infinite. It was therefore one view of the statute of Queen *Ann* (connected with the stat. 4 & 5 of *William and Mary*) to lay some restraint on those prosecutions by requiring a previous leave from the Court in a matter of so general extent, and which is so often the subject of the most spirited litigations. It is much to be wished that some certain lines could be drawn, and the discretion of the Court in some degree confined. It is indeed very difficult to do it, as every different case has its own peculiar circumstances, and from those the Court must determine upon each. But the present occasion suggests the propriety of a few general rules; which, if they be not always decisive, will at least have great weight and influence with the Court. 1st, If the objection upon which the application is founded has been known and acquiesced in by the whole corporation a great number of years, it is a reason for not suffering any member of that body to impeach a title which themselves have so long and knowingly admitted. The acquiescence of the corporation would indeed give no right to the party, if his title be really defective in itself; but it is a reason why those who have suppressed that defect such a great length of time should not afterwards be admitted as common relators. The great view of the statute of Queen *Ann* in the privileges it allows to common relators was to hasten the removal of usurpers, and thereby prevent the ill consequences that might ensue from such usurpations; but those who have lain by and permitted the usurpation a great number of years can have no claim at all to the benefit of that act. In such a case, the application would appear to be dictated by some impure motives, some change of interests in the par-

(c) 4 Barr. 2122. This was also read from the same MS. as the reasons of Mr. Justice *Yates* for assenting to the judgment there pronounced.

ties applying, which a court of justice will never assist. They will therefore leave it wholly to the crown alone to dispute the title. 2dly. If the parties applying for leave to prosecute did themselves give their vote for the very man they object to, and have all along concurred with him in many corporate acts without ever excepting to his title, this is also a reason for not allowing those parties to contradict their own conduct, by impeaching a title which themselves created, or have knowingly admitted. 3dly. The nature of the objection may be another reason for rejecting a stale prosecution. If the objection be vague and indefinite in its nature, depending upon evidence which the distance of time may render more difficult or uncertain, and consequently the defence more embarrassed, it might lay very unreasonable difficulties upon the defendant, if every common relator might put him upon answering it at the distance of 18 or 19 years. 4thly and lastly, If the prosecution proposed instead of reforming the constitution, and introducing good order and regularity into the corporation, would throw the whole body into general confusion, the Court would hardly suffer a common relator to commence a prosecution of so mischievous a nature."

The Court desired the counsel in support of the rule to confine themselves to the objection made to the prosecution of these relators; saying that as to the validity of the election they would not take upon them to decide it in this stage; it was enough to say that it was sufficiently doubtful to put it in a course of inquiry before a jury.

Perceval and *Balguy*, in support of the rule, said that it would be carrying the doctrine of acquiescence a great length to conclude the application by the present relators, because they had not been in a situation to litigate the defendant's title for four years, being two less than the limitation allowed by law. It is not pretended that they had voted for the defendant's election as alderman, which they now sought to impeach; but as far as they could they opposed it by voting for another candidate. The expence of such prosecutions is considerable, and it may not be convenient to parties to incur it immediately after an election: but if their attendance afterwards in conjunction with the party so elected at annual corporate meetings be a ground for denying their application, the statute which gives them leave to apply within six years will be rendered nugatory: for such elections are indispensably necessary in order to carry on the government of the place, and it is the duty of every corporator to attend. In the cases cited some of the relators who applied had been concerned in the very acts which they came to impeach, which furnishes a leading line of distinction whereon the Court has frequently acted. But here the relators opposed the defendant's election as alderman. Neither is it sworn that any of them actually concurred in his election as senior bailiff, though they might not have openly opposed it. They were then stopped by the Court.

Lord KENYON, C. J. The legislature have lately had this subject under revision, and have thought proper to draw a line of limitation of six years, after which no corporator's title shall be impeached for any original defect in it. This is a most wise and beneficial rule; and it is fit that our discretion should be governed by the same limitation in ordinary cases, so as not unnecessarily to fetter these applications beyond what the legislature have thought proper to do. The Court have indeed on several occasions said, and said wisely, that they will not listen to a common relator coming, though within the time limited, as a mere stranger to disturb a corporation with which he has no concern(a), nor even a corporator who has acquiesced or perhaps con-

(a) In the case of the *King v. Kemp*, H. 29 G. 2. a similar application was made against the defendant for claiming, &c. to be a freeman of the borough of *Seaforth*, at the relation of one *Watts*, who was a stranger to the corporation, and who rested the application on his own affidavit, which was insisted on as a preliminary objection to granting the rule, though there was also a sufficient answer given upon the merits. The Court discharged the rule with

curring in the very act which he afterwards comes to complain of when it suits his purpose: and so far I think we have determined rightly. But I have never known the restriction carried further; nor am I prepared to carry it to the length now contended for. It is said, these parties are concluded from impeaching the defendant's title, because he has been since elected senior bailiff without their opposition, and because they have attended other corporate meetings with him. But I cannot impute this as blame to them. There must be magistrates, and the powers of Government cannot stand still till the validity of a former disputed election is ascertained. In some corporations, whose charters contain non-intromittant clauses, justice would be at a stand if such elections did not take place. The necessity of a government *de facto* is recognised even in the instance of title to the crown by the stat. passed in the reign of Hen. 7th, 11 H. 7. c. 1. In this instance, therefore, the relators having objected to the defendant's election to the office of alderman at the time, I cannot think that their not having opposed his election since to a necessary annual office of magistracy is such an acquiescence in the original defect of his title as precludes them from making this application within the time allowed by law. With respect to the merits, the question is put too much *in dubio* by the affidavits on either side for the Court to say that it is not proper to be inquired into by a jury.

Per Curiam,

Rule absolute(a).

Shirreff and Another v. Wilks (originally sued with G. Bishop and W. Robson, who have been outlawed in this suit.)

1 East, 48. Nov. 18, 1800.

Two (of three) partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor upon the firm in their joint names: but such security is fraudulent and void as against the third partner, and cannot be recovered in an action against the three, wherein one only of the original partners pleaded to the action.

THIS was an action upon the case upon a bill of exchange for 78*l.*, dated the 5th of November 1798, payable to the order of the plaintiffs two months after date, which was stated in the declaration to have been drawn by them on the said G. Bishop, W. Robson, and J. Wilks, by the name and description of Messrs. George Bishop and Company, and to have been accepted by

costs. And Lord Kenyon, C. J. in delivering his opinion; after shewing that *Watts'* affidavit had been completely answered, said, "Then it is to be considered who *Watts* is. If he had shewn that his own and other person's privileges had been injured, he would perhaps have had reason for preferring this complaint; but the fact is otherwise. He comes here as a perfect stranger to the corporation, prying into other men's rights. I do not mean to say that a stranger may not in any case prefer this sort of application; but he ought to come to the Court with a very fair case in his hands."

(a) So late as in *M. 29. G. 3.* the Court held in the case of the *King v. Bond*, 2 Term Rep. 767. that no possession of a corporate franchise for less than 20 years was of itself a sufficient objection to the granting of an information in the nature of a *quo warranto*: and it was granted there after a possession of 12 years. It was there also considered to be no objection to the application that the defendant's title had been before attacked by a similar information which was afterwards abandoned. Afterwards, in the case of the *King v. Dickins* in H. 81 Geo. 3. 2 Term Rep. 284. the Court came to the resolution of limiting in future their own discretion in granting applications of this nature to six years, beyond which they would not under any circumstances suffer a party's title to be impeached. And they acted upon this rule in the case of the *King v. Peacock* in E. 82 Geo. 3. 2 Term Rep. 684. Soon after the stat. 83 G. 3. c. 58. was passed, which stamped the propriety of it with legislative authority.

them. The defendant *Wilks* pleaded the general issue, on which issue was joined.

The cause came on to be tried before Lord *Kenyon* at *Guildhall*, on the 5th of *June* last, when the jury found a verdict for the plaintiffs for 90*l.* 10*s.* including interest on the bill; subject to the opinion of this Court on the question, whether the plaintiffs were entitled to recover under the circumstances of the case.

The plaintiffs, in *October* 1795, sold and delivered a quantity of porter to *Bishop* and *Wilks*, who were then partners, which porter was entered in the plaintiffs' books in the names of *Wilks* and *Bishop*; and the same was afterwards shipped for the *West Indies*, and the defendant *Wilks* paid the shipping charges. *Robson* became a partner with *Bishop* and *Wilks* in *April* 1796, and continued so till the 8th of *November* following, when their partnership was dissolved. The defendant *Wilks*, previous to the dissolution of the partnership, sent to the plaintiffs a memorandum or calculation in his own hand writing of certain deductions claimed by him in respect of the porter. The balance due to the plaintiffs in respect of the porter was 7*5*l.** for which the plaintiffs drew upon the defendants the bill mentioned in the declaration, which bill was accepted by *Bishop* in the partnership firm of all the defendants, by his subscribing thereon "Accepted, G. B. and Co."

Laves for the plaintiffs. As between the plaintiffs and *Bishop* and *Wilks*, the original partners by whom the debt was contracted, it must be admitted that *Wilks* is bound by *Bishop's* acceptance, though it were made without his concurrence, because one partner may bind another by accepting a bill on account of a partnership debt. It is true, that one partner cannot pledge the security of another for his own private debt^(a), not if there be any fraud in the transaction as between him and the creditor to whom such security is given: but this was a debt incurred in the course of trade, and not of an individual or private nature. And no fraud is found here, nor can any inference of fraud arise from the facts stated. The creditors were guilty of no imposition in drawing the bill originally, nor could they control the manner in which it was to be accepted: but when accepted by any one of the house in their joint names, they must all be bound by it in the ordinary course of commercial dealings. If *Wilks* would have been bound, though he did not concur in the act of acceptance, and if the partnership fund were originally answerable to the plaintiffs, the introduction of a third partner cannot vary the case; it was only the continuance of the old partnership with the addition of a new member; and the bill was drawn on the fund which really and truly ought to pay it. The debt as between the defendants must be taken to have been transferred to the new partnership: but whether that were so or not is a matter to be settled between themselves, with which the plaintiffs have no concern. With regard to creditors, the act of one partner must be taken to bind all the rest, otherwise all dealing with them must be attended with great perplexity. It may not be known to many at what time such a partner was taken into the firm.

Gibbs, contra, was stopped by the Court.

LORD KENYON, C. J. I do not know how this case came to be reserved for the opinion of the Court; for I have decided the same question repeatedly at the sittings, and the propriety of my decision has never been canvassed again upon a motion for a new trial. This is an action brought against three persons, *Wilks*, *Bishop*, and *Robson*, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by *Bishop* alone in the name of the firm. The consideration for this bill was some porter which had been sold by the plaintiffs to *Wilks* and *Bishop* only, at a time when *Robson* had

(a) *Grogan* and others v. *Hutton* and *Foscroft*, B. R. E. 22 Geo. 3. *March* v. *Ven- sommer* and another. Sittings after Mich. T. 1786. at *Guildhall*, cor. *Buller*, J.

no concern with the house. Then the plaintiffs, knowing this, draw the bill upon all the three partners, and knowingly take an acceptance from one of them to bind the other two, one of whom, *Robson*, had no concern with the matter, and was no debtor of theirs; no assent of his being found, and nothing stated to shew that he had any knowledge of the transaction. It is hard enough for one partner in any case to be able to bind another without his knowledge or consent; but it would be carrying the liability of partners for each other's acts to a most unjust extent, if we suffered a new partner to be bound in this manner for an old debt incurred by other persons. The plaintiffs, therefore, ought not in justice to have taken this security by which they were to bind one who was not their debtor: the transaction is fraudulent upon the face of it. It is no answer to say, that one partner has a general power of binding the rest. So an executor has power to bind the assets of his testator, and to sell and dispose of his effects; and the law reposes a confidence in him that he will apply the proceeds in payment of the testator's debts and legacies: but if fraud could be proved in any particular transaction between the executor and a purchaser such a sale would be void. In the case of *Worseley v. De Mattos*, 1 Burr. 474, 5. Lord *Mansfield*, in delivering the opinion of the Court, says, that "valid transactions as between the parties may be fraudulent by reason of covin, collusion, or confederacy, to injure a third person:" and he instances, "if a man, knowing that a creditor has obtained a judgment against his debtor, buy the debtor's goods for a full price, to enable him to defeat the creditor's execution, it is fraudulent. Again, if a man, knowing that an executor is wasting and turning the testator's estate into money, the more easily to run away with it, buy from the executor with that view, though for a full price, it is fraudulent." The same doctrine was recognised by Lord *Hardwicke* in *Mead v. Lord Orrery*, 3 Atk. 235, 7; and again by Lord *Mansfield* in *Whale v. Booth*, cited in the notes of the report of *Farr v. Newman*, 4 Term Rep. 625; and also in the case of *Elliot v. Merryman*(a), and in other cases. And nothing can be better established as a general rule than that the law will set aside every contract which is fraudulent. Such is the case here. *Wilks* and *Bishop* owed money to the plaintiffs; these latter, knowing that *Robson* had no concern with the matter, fraudulently receive from *Wilks* and *Bishop* a security by which *Robson* is to be bound: this, therefore, cannot be enforced in this action.

GROSE, J. This is a mere fraudulent attempt to make *Robson* pay the debt of *Bishop* and *Wilks*; and the plaintiffs shall not be permitted to avail themselves of a security so obtained in order to bind a man without his assent for the payment of a debt who owed them nothing. And the security being void against *Robson*, the plaintiffs cannot recover in this action against the three, wherein if he obtained judgment he might sue out execution against any of the defendants.

LAWRENCE, J. The plaintiffs in this action declare as upon a promise by three defendants, and consequently to entitle themselves to recover they must prove a promise either express or implied binding upon all the three: in this they have failed, and therefore there must be judgment against them. In addition to the authorities cited by my Lord to shew that *Robson* was not bound by this act of his partners, is the case of *Hope v. Cust*. [He then read the following note from a MS. of the late Mr. Justice *Buller*, taken by him, when he was at the bar.] "*Hope v. Cust*, Sittings at *Guildhall* after *Mich.* Term 1774. Mr. *Fordyce*, who traded very largely in his separate capacity, as well as in the business of a banker in partnership with others, having considerable dealings in his private capacity with *Hope* and Co. in *Holland*, did, for and in the names of himself and partners, give them a general guarantee for the money due from him in his separate capacity. *Fordyce* became a bankrupt,

(a) 3 Barnard, Ch. Rep. 81. Vide *Crane v. Drake*, 2 Vern. 616.

and afterwards all the partners became bankrupts. And a bill was filed in the court of Chancery by *Hope* and Co. in order to have the benefit of this guarantie: upon which that court directed an issue to try the validity of it. Lord *Mansfield* in summing up the evidence to the jury, said, there is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guarantie in the name of all the partners, it binds all. But there is no general rule which may not be infected by covin, or such gross negligence as may amount to or be equivalent to covin: for covin is defined to be a contrivance between two to defraud or cheat a third. Therefore, the whole will turn on this, whether the taking the guarantie from *Fordyce* himself in his own hand writing, without consulting the other partners or having their privity, is not such gross negligence in the *Hopes* as will amount to a fraud or covin. *Fordyce* was acting in two several capacities, having transactions in his own name only, for his own separate benefit, and in the names of the partnership for his own benefit. This case comes out of Chancery, where an affidavit or answer of all parties might have been had if necessary; but none such has been produced, and therefore it must be taken that the partners knew nothing of it, and had no profit by it, or privity in the transaction. Another fact to be granted is, that as between *Hope* and Co., and *Gurnal* and Co. and *Fordyce*, the whole transactions are avowedly with *Fordyce* only in his separate capacity. The next fact is the correspondence in 1770, preceding the second guarantie. It is clear that *Fordyce's* deposits and interest in the funds were both doubted, and then the *Hopes* tried to make a scheme to get a second security without shocking him, by suggesting there was a new partner. The first guarantie was given in 1764, and that never had been called in, and still existed. There was then no occasion for a new one: for the change of a partner and taking in a new one would not destroy a former guarantie. The scheme was to get security for debts not well secured, the goodness of which was doubted; and they therefore get this from *Fordyce* alone, clandestinely, without the knowledge of his partners. If the fact be clear that *Hope* and Co. and *Gurnal* and Co. knew that this was done to cheat the partners of *Fordyce*, there is no question in the cause. But it is manifest that they trusted to it as binding on the partnership. Therefore, this brings it to the second question, Whether it be not a gross negligence; especially as they knew at the time that *Fordyce* was acting in his separate capacity; and this security was intended to indemnify them against his separate debts. Verdict for defendant. Lord *Mansfield* afterwards, in his report to the court of Chancery, on a motion being made for a new trial, said, three things were established to the satisfaction of himself, and the jury. First, that the transactions between *Hope* and Co. and *Fordyce* were wholly on *Fordyce's* account. Secondly, That that the partners of *Fordyce* derived no profit or benefit whatsoever from them. Thirdly, That they had no notice of the guarantie, and consequently did not acquiesce in it. And Lord *Mansfield* said he left it to the jury, whether under these circumstances the taking of these guaranties were, in respect of the partners, a fair transaction or covinous, with sufficient notice to the plaintiffs of the injustice and breach of trust *Fordyce* was guilty of in giving them."

LE BLANC, J. This case must be determined in the same manner as if *Robson* had pleaded to the action. It seems admitted, that if one of several partners pledge the partnership fund for his individual debt, that will not bind the rest. Now I see no difference between the case of one and the case of two of several partners pledging the joint fund for their individual debts; which is the case before us.

Postea to the defendant(1)(2).

(1) Vide *Swan v. Steele*, 7 East, 210, and the editor's note thereto *ad finem*.

(2) [A security in the name of the firm given for a separate debt of one of the partners,

Farr v. Price.

1 East, 55. Nov. 18, 1800.

A promissory note written upon a stamp of greater value than the proper stamp required cannot be received in evidence, though the stamp were applicable to the same kind of instrument.

THIS was an action on a promissory note for 25*l.* 6*s.* dated the 14th of July 1797, payable to order three months after date. The declaration also contained the common counts. The note was given by the defendant to one Jones, and by him indorsed to the plaintiff. At the trial before Thompson, B. at the last Spring assizes for Hereford, the only evidence produced was the note itself, which was objected to, as having a nine-penny instead of an eight-penny stamp, as required by the stat. 37 Geo. 3. c. 90. which was in force before the making of this note(a): a verdict was however taken for the plaintiff, reserving the question of law for the opinion of the Court.

Bevan obtained a rule in Easter term last, calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had. This was moved on the authority of *Robinson v. Drybrough*, 6 Term Rep. 317. where it was holden, that articles of agreement under seal could not be given in evidence unless stamped with a deed stamp, although the respective stamps were of the same value.

Law shewed cause in the same term, and said that as justice had been done in this case, the Court would not disturb the verdict, according to the case of *Edmonson v. Machell*, 2 Term Rep. 4. where the Court on that account refused to enter into the discussion of the question at law. That it was a case of peculiar hardship on the plaintiff, there having been no intention in this case to evade the duty, and more having been actually paid to the revenue than was necessary. That the case of *Robinson v. Drybrough* was so far distinguishable from the present that there the stamp used was of a different description from that required by law in the particular case, whereas here both the stamp used and the proper stamp were applicable to the same kind of instrument; and some stress was there laid upon the appropriation of different duties to distinct purposes. Here too the stamp used was larger than was required; and in a late case in the Common Pleas, Lord Eldon had ruled that the larger stamp must be taken to include the smaller one.

The Court thinking this a case of great hardship, where no fraud was intended; and it having been intimated to them, that it was in contemplation to introduce a bill into parliament for affording relief in such cases, they ordered

of course, without more, does not bind the firm. If reception by the creditor furnishes presumption of collusion with the partner giving the security, with a view to the injury of his copartners. The burden of proof lies upon the creditor to shew assent either precedent or subsequent by the other members of the firm. This he is at liberty to do—and it becomes a question of fact for the jury. *Collyer on Partnership*, 347. See particularly the remarks of Lord Eldon in *Ex parte Bonbonus*, 8 Ves. 540. *Chayoumes v. Edwards*, 3 Pick. 8. *Munroe v. Cooper*, 5 do. 412. *Adams v. Paige*, 7 do. 542. 548. *Noble v. McClintock*, 2 W. & S. 152. *Everingham v. Ensworth*, 7 Wend. 326. *Gannswort v. Williams*, 14 do. 138. So, if a partner borrow money, and give his own note for it, it does not become a partnership debt, merely by being applied to partnership purposes. *Graeff v. Hitchman*, 5 W. 454. *Emily v. Lye*, 15 East, 6. *Bevan v. Lewis*, 1 Simon, 376.—W.]

(a) By the stat. 31 Geo. 3. c. 25. the stamp required on such a note as the one in question was 6*d.*, and for a note for above 30*l.* and not exceeding 50*l.* the stamp was 9*d.* The act of the 37 Geo. 3. c. 90. imposed an additional duty of 2*d.* on notes of the former description, and 2*d.* on those of the latter. The fact here was that the note being drawn soon after the passing of the last mentioned act, and before the general issue of the new stamps, was, to avoid any appearance of evading the law, written upon the nine-penny stamp which was then appropriated to notes of greater value.

the matter to stand over in order to await the expected event. But nothing of that sort having occurred, the case was now called on again in the peremptory paper; when

Law again renewed his former arguments.

LORD KENYON, C. J. We ordered this matter to stand over, not because we had any doubt upon the law, but to afford time to the plaintiff to get relief elsewhere. But however much it were to be wished that an *ad valorem* stamp would suffice in these cases, yet till the legislature so declare it, no other than the particular stamp appropriated by the law to the particular instrument can be deemed sufficient. The words of the stamp acts are express, and can admit of no other interpretation; and therefore it cannot make any difference in this case, that the stamp used was larger than was required, or was applicable to the same purpose.

LE BLANC, J. The ground of objection was truly this, that at the time when this note was made there was no such stamp in existence as a nine-penny stamp for a promissory note.

The other Judges assenting,

Rule absolute(1).

LORD KENYON then observed, that as there were other general counts in the declaration, if the plaintiff could give other evidence of a consideration paid by him to the defendant, he would not be concluded from recovering by the fact of the defendant's having given this imperfect promissory note for it(a).

The King v. The Inhabitants of Crediton.

1 East, 59. Nov. 19, 1800.

Where the master of an apprentice told him "that he had no farther employment for him, and he might go where he pleased," and the apprentice hearing of another master was going to him, and being met by his original master, and asked where he was going, answered that he was going to *U.*, to which the master replied "he might go there or where he pleased;" held this was not such a particular assent of the original master to the service with *U.* as would enable the apprentice thereby to gain a settlement, tho' the indentures were not delivered up or cancelled.

TWO justices by an order removed *William Milton*, *Mary* his wife, and *Mary* their daughter, from the parish of *North Tawton* to the parish of *Crediton*, both in the county of *Devon*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on a case stating; That *William Milton*, the pauper, was bound apprentice to *Andrew Matthews*, whom he

(1) *Vide Taylor v. Hague*, 2 East, 414. *The King v. The Inhabitants of Keynham*, 5 East, 309.

(a) Where a promissory note had been given for money lent, but when produced in Court was unstamped; Lord Kenyon, C. J. permitted the plaintiff to recover on a common count for money lent, by proving that when the money for which the note had been given was demanded of the defendant, he acknowledged the debt. *Tyle v. Jones*, Sittings at Westminster adjourned to 29th of October 1788. So in *Alves v. Hodgson*, 7 Term Rep. 241, the Court held, that the plaintiff could not recover upon a written contract for payment of wages made in *Jamaica*, which by the laws of that island was void for want of a stamp; yet that he might recover upon a count for a quantum meruit, because the written contract could not be received in evidence. Yet where the defendants, who had advanced money upon the security of a ship at sea, took an absolute conveyance of the property, which afterwards turned out to be defective and void by reason of its not being conformable to the statute 26 Geo. 3. c. 60. s. 17. directing such transfers of property to contain certain particulars; the Court held that the vendees could not retain the possession of the ship, which they had seized upon her arrival, by resorting to the general lien, which the possession of the grand bill of sale might otherwise have conferred on them; but that they were liable in trover brought by the assignees of the vendor who had in the mean time become a bankrupt. *Rolleston v. Hibbert*, 3 Term Rep. 408. [*Smith v. Smith*, 2 Johns. Rep. 285.]

served above 40 days in the Parish of *Crediton*. *Matthews* failing in business told the pauper he had no further employment for him, and he might go where he pleased. Afterwards, and before leaving his master, one *Haydon* came to inform the pauper that one *Underhill*, who wanted a boy, was at an inn in the neighbourhood of his master's house, and that he should go to the inn. As the pauper was going out of the house, his master met him, and asked him, where he was going? The pauper told him he was going down to *Underhill*. *Matthews* said "he might go there or where he pleased." Thereupon the pauper left *Matthews's* house, and went and hired himself and lived with *Underhill* above 40 days in the parish of *Sampford Courtenay*, but no communication appeared to have taken place between the original master and *Underhill*. The question submitted by the sessions was, Whether this were such an assent of the original master to the apprentice serving *Underhill* as enabled the apprentice to gain a settlement in *Sampford Courtenay* by his service with *Underhill* there.

Gibbs and *Holland*, in support of the order of Sessions, contended that this was the case of a general licence from the master to the apprentice to serve whom he pleased. Neither party considered the indentures as subsisting, and consequently no particular assent to the service with *Underhill* could have been in the contemplation of the master: Neither did the answer import any such assent. It meant no more than that the master no longer considered the pauper as his apprentice, and he might go where he liked. The case then falls within the principle of the case of *R. v. Sandford*, 1 Term Rep. 261. There the indentures still subsisted in point of law, because the pauper was under age, and being a parish binding, it could not be put an end to without the assent of the parish officers; but the master having delivered them up, considering them as at an end, the Court held that the apprentice did not gain a settlement as such by serving another master, though at the recommendation of his original master; which was stronger evidence of assent to the particular service than exists in the present case. The Court then desired to hear the counsel for the appellants.

Clapp and *East*, contra, contended that the pauper gained a settlement by his service with *Underhill* under the indentures, by the consent of the original master. A particular leave is not inconsistent with a prior or concomitant general leave. It is clear that the apprenticeship still subsisted in point of law notwithstanding the general leave to the apprentice to go where he pleased, the indentures not having been either cancelled or delivered up; as in the case of *R. v. St. Luke's*, Burr, S. C. 542, and that class of cases (a); nor any consideration paid for the giving them up, as in *R. v. Harberton*, 1 Term Rep. 139. The master might have recalled this general leave at any time, and insisted upon the service of his apprentice. His subsequent assent to a particular service operates as such recall, at least *pro tempore*. Here was a particular assent to go and live with *Underhill*, though at the same time the master said he might go wherever else he pleased. A mere knowledge by the master of the particular service will not enure as a consent, but this is a previous permission to serve a particular person by name. The case of the *King v. Sandford* is distinguishable from the present; for there the indentures were actually delivered up, which rebutted any idea of a subsequent particular assent to the service with another master; and such was considered to be the ground of that decision in *R. v. The Holy Trinity in the Minorities*, 3 Term Rep. 607. But the mere circumstance of a prior general leave has never been considered as an objection to a subsequent particular leave as in *R. v. Fremington*, Burr, S. C. 416. The case of *Tavistock v. Kelly*, Burr, S. C. 578. 1 Blac. Rep. 635, S. C. is in point to shew that an assent to a particular service may operate to give a settlement though accompanied with a general

(a) *Vi. R. v. Titchfield*, ib. 511, and *R. v. Notton*, ib. 629.

leave to serve whom the pauper pleased. There the original master, when applied to by one *Mason* to know whether it were with his own consent that the pauper should live with him, answered, "with all his heart he might live with *Mason* or anybody else, provided he performed his agreement with him;" (which agreement was to pay him a guinea a-year during the remainder of the apprenticeship). This was holden to be a particular assent to the service with *Mason*. So in *R. v. Bradninch*, Tr. 21 Geo. 3. Const. 594, leave was first given to the pauper to go and serve whom he pleased, notwithstanding which, after the pauper had entered into another service, the master meeting him, and telling him "it was a very good place for him, and he hoped he would continue in it," was holden to be such an assent to the particular service as enabled the pauper thereby to gain a settlement. Though neither in that case any more than in the present was the assent of the first master communicated to the second.

LORD KENYON, C. J. The service with *Underhill* was not a prosecution of the service of the original master. Some of the cases upon this subject have been carried to a greater degree of refinement than might be desirable if they were to be decided again *de novo*; but we are to be governed by the general principle resulting from them, and not by particular expressions which vary in every case. It would perhaps have been better to have confined the power of gaining a settlement to a service with the original master. The case of the *King v. St. George's Hanover Square*, Burr. S. C. 12, first broke in upon that line, and determined that an apprentice serving another by the consent of the original master might thereby gain a settlement: from thence has ensued such a train of decisions as it is difficult to follow; however the general principle of them all is to be found in the *King v. Austrey* in Burr. S. C. 441. where Lord Mansfield said, that in order to gain a settlement by the apprentice serving another master, there must be "an express and explicit leave and consent given by the master to the particular service," so as to be considered as "a service of his master under the indenture;" and not, as he observed in that case, "a leave intended to be quite general;" or as here a general quitting of the service and leave to go where the pauper pleased. Here the master first tells the pauper he had no longer any employment for him and he might go where he pleased, and then somebody having sent for the pauper, he tells his master, on being asked where he is going, that he is going to *Underhill*, on which the master repeats in effect what he had before said, that he might go there or where he pleased; meaning that he no longer looked for his service or took any concern how he disposed of himself.

GROSE, J. There must be a particular consent of the original master to the service with another in order to give a settlement. In the case of the *King v. The Holy Trinity in the Minories*, there was a particular recommendation to a particular service, which the Court held sufficient for that purpose. Whether there be such a particular assent of the original master to the subsequent service is more a question of fact than of law(a), and here the Sessions have in effect negatived that fact by finding that the pauper gained no settlement by the service with the second master.

The other Judges agreed that the conversation stated did not import an assent by the master to the particular service; but was in effect no more than repeating what he had at first said, that he had no further occasion for the pauper, and he might go where he pleased.

Order of Sessions confirmed.

(a) Vide post. *R. v. The Inhabitants of Shebbear*, p. 73.

Davison and Another v. Gill.

1 East, 64. Nov. 21, 1800.

An order made by justices of peace under the st. 13 Geo. 3. c. 78. s. 19. for stopping up an old foot-way and setting out a new one, must follow the form prescribed in the schedule annexed to the act, and set forth the length and breadth of the new foot-way; otherwise it is no answer to a justification of a right of way pleaded to an action of trespass *quare clausum fregit* brought by the owner of the soil over which the old way led. The statute requires, that the form set forth in the schedule "*shall be used on all occasions, with such additions and variations only as may be necessary to adapt it to the particular exigency of the case.*" Under these words a material variance from the form prescribed is fatal, and may be taken advantage of in a collateral proceeding.

TO trespass for breaking and entering the plaintiff's close called *Beck Meadow*, in the parish of *Arnold* in the county of *Nottingham*, the defendant pleaded the general issue, and a justification of a public footway over the said close; upon which issues being joined, the cause was tried at the last assizes at *Nottingham*. It was admitted that the defendant used the road mentioned in the pleadings subsequent to its being turned as hereafter stated: and the jury found a verdict for the plaintiffs subject to the opinion of this Court upon the following case. The road in question time immemorially has been used as a public footway leading from the town of *Arnold* in the parish of *Arnold* to the town of *Nottingham* through and over the said close of the plaintiffs' called *Beck Meadow*, until the same was stopped up under the authority of two justices at a special session holden for that purpose on the 9th of *March* 1798, pursuant to a notice under their hands and seals dated 24th of *February* preceding; whose orders and proceedings have been duly inrolled by the clerk of the peace, and are as follows: "To his majesty's justices of the peace for the county of *Nottingham*, to be assembled at their special sessions to be held, &c. within the parish of *Arnold* in the said county of *Nottingham*, on *Friday* the 9th of *March* 1798. Whereas there is now a certain footway or road leading from *Arnold* aforesaid towards *Nottingham* lying and being through certain lands and grounds called the *Beck Meadow* and *Beck Meadow End Closes*, within the said parish of *Arnold*, belonging to *Sarah Coape Sherbrooke* gentlewoman, and *Mrs. Mary Lomas* and her said son *Samuel Lomas* respectively, and described in the plan hereunto annexed(a), "Old Foot Path." And whereas it would be more commodious to the public to have the said foot-way or road diverted, or turned, and stopt up, and to have the foot-way or road from *Arnold* aforesaid toward *Nottingham* to go in future on the common highway leading from near *Arnold Mill* into the turnpike road near thereto leading towards *Nottingham*, and from thence over part of a close or parcel of land belonging to the said *S. C. Sherbrooke* nearly opposite to *Daybrook* turnpike gate, and from thence along the said turnpike road leading towards *Nottingham*, as the same, is now made convenient and commodious for people on foot, and described in the plan hereunto annexed "New Foot Path," in lieu of and in exchange for the said old foot-way or road; Now we the said *S. C. Sherbrooke*, *Mary Lomas* and *Samuel Lomas* do hereby consent and agree, and also request, that the said old foot-way or road may from henceforth, and at all times hereafter, for ever, be wholly stopt up and discontinued to be used as such, and that the footway or road from *Arnold* towards *Nottingham* aforesaid may

(a) There was a map of the new and old path annexed to the case, according to a certain scale as therein marked of a quarter of an inch to ten yards, whereby it appeared that the path was turned from the old direction across the fields, into the turnpike road which led round the same fields; from which road the path originally led, and into which at some distance it came again.

go in future on the said new foot path above described in lieu of and in exchange for the said old foot-way or road. And each of us do hereby consent and agree that such new foot-way or road, which is now put into a good state as such, shall or may at all times hereafter be used and remain as a foot-way or road, and become public to all intents and purposes whatsoever; and be maintained and repaired by us and the owners of the said *Beck Meadow* and *Beck Meadow End Closes* for the time being, in proportion to our respective rights and interests in and upon the same; upon condition that the said old foot-way or road over the said lands or grounds belonging to us respectively be afterwards vested and become wholly and entirely the property of us, according to our respective estates and interests therein. In witness whereof we have hereunto set our hands and seals this 7th day of *March*, S. C. *Sherbrooke*, M. *Lomas*, S. *Lomas*. Witness *J. Falkner*.

Nottinghamshire. We the Reverend *James Bingham* and *Charles Wylde*, clerks, two of his majesty's justices of the peace for the said county of *Nottingham*, at the special sessions within mentioned, having upon view found that the within mentioned old foot-way or road-way may be diverted and turned as within expressed and requested, and having viewed the new foot-way or road within mentioned, which we do hereby certify is completed and put into good condition and repair, do hereby order that the said old foot-way or road be diverted and turned in and upon the said new foot-way or road, in such manner as within particularly mentioned; and do order and direct that the said old foot-way or road shall from henceforth be stopped up or inclosed by the respective owners of the lands or grounds, through which the same hath hitherto gone; and all the land and soil thereof be vested in and become their property respectively, according to their respective estates and interests therein. Given under our hands and seals this 9th day of *March* 1798. *J. Bingham*, *Charles Wylde*.

Against this order there was an appeal to the quarter sessions, which confirmed the order of the justices. The turning of the said new road over the close belonging to the said S. C. *Sherbrooke* nearly opposite to *Daybrook* turn-pike is beneficial to the public. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover; if they are, the verdict for the plaintiffs to stand; but if not, then a nonsuit to be entered.

This case was first argued in last *Trinity* term by *Clarke* for the plaintiff, and *Dayrell* for the defendant, when the Court ordered it to stand over with a view to an accommodation between the parties; which ultimately did not take place.

The objections then urged to the order of the magistrates stated in the case were these(a); 1. That it did not state that the new way was nearer or more

(a) The st. 13 Geo. 3. c. 78. on which the objections were founded enacts, (a. 19.) That "when it shall appear upon the view of two justices of the peace, that any public foot-way, &c. may be diverted, so as to make the same nearer or more commodious to the public, and the owners of the lands through which such new foot-way, &c. is proposed to be made shall consent thereto, by writing under their hands and seals, it shall and may be lawful by order of such justices at some special sessions, to divert and turn, and to stop up such foot-way, &c. and to purchase the ground for such new foot-way, &c. by such ways and means, and subject to such exceptions and conditions, in all respects, as herein before-mentioned with regard to highways to be widened or diverted. And where such foot-way, &c. shall be so ordered to be stopped up, and such new foot-way, &c. set out and appropriated in lieu thereof, as aforesaid, it shall and may be lawful for any person aggrieved by any such order, or proceeding, &c. to appeal to the next quarter sessions, &c. after such order made, upon giving notice, &c. which court is hereby authorized to hear and finally determine such appeal. And if no such appeal be made, or, being made, such order shall be confirmed by the said court, the said way may be stopped, and the proceedings thereupon shall be binding and conclusive to all persons whomsoever; and the new foot-way, &c. so to be appropriated and set out, shall be and for ever after continue a public foot-way, &c. to all intents and purposes whatsoever; but no stoppage of such foot-way, &c. shall be made, until such new foot-way, &c. shall be completed and put into condition and good repair; and so certified by

commodious to the public than the old way. 2. It did not state the consent of the owners of the land over which the new path was turned, viz. the trustees of the public road. 3. The justices have not followed the form prescribed by the act in the schedule, particularly in not having set forth the length and breadth of the new path; for want of which the public cannot know what they are entitled to use; nor if the way be out of repair, how much space is to be indicted. 4. The act requires two distinct orders of the magistrates in these cases, one for diverting the road and making the new road, and the other for stopping up the old road: And it appears from the act that the one is to depend upon the other; for the old road is not to be stopped up till a certificate from the magistrates that the new road is completed and put in good condition; which certificate is to be returned to the clerk of the peace and filed of record at the sessions.

Lord KENYON, C. J. then observed, that as to the consent of the trustees of the turnpike road, the soil was not vested in them, but remained in the persons who were entitled to it before the act passed by which they were appointed. The trustees have only the control of the highway. And here was nothing taken out of the highway by the order; but the old foot-path was merely turned into it, where the public had a right to go before. If that were out of repair, it could not be indicted as a foot-way, but according to the more extensive description which belonged to it as a way for carriages, &c. But all the Court thought there was great weight in the objection that the magistrates had not pursued the form of the order directed by the statute to be used.

Clarke, for the plaintiff, now contended, 1st, That the road had been legally stopped up by the order of the magistrates. Or, if that were irregular, 2dly, That no advantage could be taken of it in this action. 1. The 69th sect. directing the form of the order set forth in the schedule to be used is merely directory; and if the substance of the order be preserved, it is sufficient. The act was passed in ease of the subject, and is therefore to be construed beneficially, 2 Vern. 431.: and the same section enacts that no advantage shall be taken for want of form in the proceedings; which was unnecessary if the legislature had supposed that no other form than that ap-

two justices of the peace, upon view thereof; which certificate shall be returned to the clerk of the peace, and by him enrolled amongst the records of the said court of quarter sessions: But from and after such certificate, such old foot-way, &c. shall and may be stopped up, &c. Sect. 69. enacts, That the forms and proceedings relative to the several matters contained in this act, which are set forth and expressed in the schedule hereunto annexed, shall be used on all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case; and that no objection shall be made, or advantage taken, for want of form in any such proceedings, by any person or persons whomsoever.

The schedule referred to (No. 21) gives the following form for such order:

“Order of two Justices for diverting and turning a public Foot-way, &c. through the Lands of any Person who consents thereto.

Middlesex. WE *A. B.* and *C. D.* esquires, two of his majesty's justices of peace for the said county, at a special sessions held at _____ in the hundred of _____ in the said county on the _____ day of _____ 1800, having upon view found, that a certain part of a foot-way within the parish, &c. of _____ in the same hundred lying between _____ and _____ for the length of _____ yards, or thereabouts, and particularly described in the plan hereunto annexed, may be diverted and turned so as to make the same nearer (or more commodious) to the public; and having viewed a course proposed for the new highway, in lieu thereof, through the lands and grounds of _____ of the length of _____ yards or thereabouts, and of the breadth of _____ feet or thereabouts, particularly described in the plan hereunto annexed; and having received evidence of the consent of the said _____ to the said new highway, being made through his lands hereinbefore described, by writing under his hand and seal; we do hereby order that the said highway be diverted and turned through the lands aforesaid; and we do order an equal assessment” &c.

pointed by themselves could be used; for that would of course be deemed sufficient. Per *Holt*, C. J. in 12 Mod. 546^o Where an act says that justices of such division shall do so and so, it is only directory *quoad* the division, and any of the justices of the county may do it. And other cases to the like purpose are collected in 19 Vin. Abr. 518. Now here the order made has substantially complied with the act. The exact length and breadth is not required to be set forth, but the length and breadth *or thereabouts*. It is therefore mere form, of which no advantage can be taken. If the measure had been set out erroneously the order could not have been vacated on that account. But supposing it were necessary that some measure should appear on the face of the order, it does so appear here, by reference to the plan annexed where there is a relative scale of the admeasurement. [Lord *Kenyon* observed, that the order did not state that the new path was set out according to the plan annexed; though the form in the schedule stated the length and breadth as well as referred to the plan annexed.] But 2dly, If the order were ever so defective, advantage could only be taken of it on appeal; and the parties having missed their opportunity are concluded. The words of the statute are positive in this respect. By s. 19. The sessions are empowered to hear and *finally* determine the appeal; and if no appeal be made, or the order be confirmed on appeal, "the ways may be stopped up," and "the proceedings thereon shall be binding and conclusive to all persons whomsoever." And by s. 80. the *certiorari* is taken away. These provisions would be rendered nugatory if the legality or propriety of the order may be canvassed again in an action of trespass; and the object of the legislature would be defeated, which was to place the jurisdiction over these matters entirely in the hands of the magistrates below. All that is necessary to appear on the face of the order, is, that the justices had jurisdiction to stop up the old way, and that they have done so, and set out a new one; the Court will not inquire in this collateral proceeding in what manner that jurisdiction has been exercised. The certificate required by the act has been given in this case: and it cannot be material whether or not it were made on the same piece of paper as the order itself.

Dayrell, contra, was stopped by the Court.

Lord KENYON, C. J. The Court are always disposed to support as far as they can the acts of the magistrates below; but we must take care not to let our wishes carry us beyond the bounds of law. The justices have a limited power given them under the act of parliament, and it must appear that this order was made by virtue of that power. The mode of proceeding chalked out in the 19th sect. was substituted in lieu of the old writ of *ad quod damnum*, which had become inconvenient from the expense and difficulty with which it was attended. A more compendious and easy method was thereby given; but still the substance of the old proceedings was to be preserved in all essential points: amongst others, none was more essential than that the exact length and breadth of the new road should be set out, in order that the public might know with certainty what they had a right to use. This was formerly to be ascertained by the jury, as it is now under the act by the magistrates. It is accordingly provided for in the form set forth in the schedule to which the enacting part refers. And the words of the act are peremptory, "that the forms of proceeding set forth in the schedule annexed *shall be used* (not the usual words *shall and may*) on all occasions, with such additions or variations *only* as may be necessary to adapt them to the particular exigencies of the case." I cannot therefore say, that these words are merely directory. Power is given to the magistrate to take away on certain conditions a right which the public before enjoyed; and this is to be done in a certain prescribed form with such additions or variations *only* as the locality of the description may require. Now here there is a material variance in the order from

the form prescribed ; for it does not set forth the length and breadth of the new path set out in lieu of the old one.

GROSS, J. The form, as it is called, is in this case substance ; because it is necessary that the public should know the length and breadth of the road which they have a right to use, the omission of which in the order is therefore a material defect, and shews that the justices of peace have not pursued the authority of the statute.

LE BLANC, J. (a) Some of the proceedings under the statute are to be before a jury (b), who are to assess damages for the value of the land taken : But how can this be done unless the length and breadth of the road are set forth in the order.

Postea to the defendant (c) (1).

The King v. The Inhabitants of Shebbear.

1 East, 73. Nov. 22, 1800.

An apprentice offered his master a guinea " to let him off," to which the master agreed, and was also to give him a suit of clothes when the guinea was paid ; but the indentures were not delivered up or cancelled. The guinea not being paid, the indentures still subsisted in law, and a settlement may be gained by serving another master with the consent of the first. The sessions ought properly to find the fact of such consent, and not merely evidence of it: But having found that on application by the apprentice to his original master for leave to serve one B. (who would not take him without) the master said " he might go with all his heart, and that it would be a good thing for him to learn the trade:" this was holden sufficient evidence to warrant the conclusion of the sessions that the original master had consented to the particular service.

TWO justices by an order removed *John Bassett*, together with his wife and children, by name, from the parish of *Shebbear* to the parish of *Bradford*, both in the county of *Devon*. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case. *John Bassett* the pauper was bound at seven years of age by a parish indenture to *William Trick* of *Bradford* till the age of twenty-four. *Trick* assigned the apprentice seven years afterwards to *John Sleeman* of the same parish, with whom he lived there till *Lady-day* 1780, when two months were wanting of the expiration of the apprenticeship. He then proposed to *Sleeman* to let him off the remainder of his time, which he at first refused to do: The pauper then offered to give *Sleeman* a guinea if he would let him off, which *Sleeman* agreed to do, and also to give him a new suit of clothes when the guinea was paid. The guinea was not paid to *Sleeman*; nor did *Sleeman* give the pauper the clothes: nor were the indentures given up or cancelled. On the morning of the *Lady-day* above mentioned, the pauper went away and offered to serve one *Brent*, who refused to employ him, conceiving him to be an apprentice. The same day he went to one *Battishill* a blacksmith in *Shebbear*, who said he would not take him without *Sleeman's* consent. The pauper then went to *Sleeman*, and told him what *Battishill* had said: *Sleeman* then replied " You may go with all my heart, I think it will be a good thing for you to learn the trade." On his telling *Battishill* what *Sleeman* had said, *Battishill* agreed with him; and he lived with him in *Shebbear* for the last forty days and upwards before he attained the age of twenty-four.

(a) LAWRENCE, J. was absent this and the remainder of the term from indisposition.

(b) VI. s. 20, 21.

(c) How far the judgment of a magistrate in a summary proceeding wherein he had competent jurisdiction is conclusive evidence even for himself in a collateral proceeding; *Vi. Strickland v. Ward*, Summer Ass. at Winchester, 1767. cor. Yates, J., cited in *Lovelace v. Curry*, 7 Term R. 631. 633.

(1) Vide *Witch v. Nash*, 8 East, 394.

East and *Lyon* in support of the order of sessions were stopped by the Court.

Clapp, contra, relied on the case of *The King v. Harborton*, 1 Term Rep. 139, where an agreement by a master with his apprentice, then of full age, to give him up his indentures, was considered by the Court as amounting to a dissolution of the apprenticeship, and consequently no settlement could afterwards be gained by a subsequent service as an apprentice. It is true, that a consideration was there paid to the master for the giving up to the apprentice the remainder of his time : but that cannot vary the case. The payment of the guinea here was not made a condition precedent to the relinquishment of the pauper as an apprentice, but only to the giving him the suit of clothes, which is usually done in the case of parish apprentices, such as the pauper was. The master by such an agreement parted with all his control over the apprentice ; and only stipulated that he should not give him the clothes till the guinea was paid. The contract was executed so far as depended on the master by his suffering the apprentice to depart from his service and enter into a new engagement. It was not necessary that the indentures should be delivered up or cancelled; according to the case of *The King v. Harborton* beforementioned. The subsequent conversation with the apprentice was not by way of giving an assent to the particular service ; but only a confirmation by the master that he no longer assumed a control over the pauper.

LORD KENYON, C. J. This case is very distinguishable from that of *The King v. Crediton(a)*, which we decided a few days ago : and upon the same ground on which we there held that no settlement had been gained as an apprentice by the subsequent service, I think it is as clear that the sessions have drawn the right conclusion in this case in adjudging that a settlement was gained by the service with the second master. There is no doubt but that the indentures still subsisted in point of law, not having been delivered up or cancelled, or any consideration paid for doing so. In the former case, we were satisfied that the master did not really mean to give a particular assent to the second service : he had there told the apprentice to go where he pleased, having no further occasion for him ; and when the apprentice told him where he was going, he answered that he might go there or any where else. But here the master was applied to for his consent to the particular person named ; and he expressed his approbation of the apprentice going there, telling him that it would be advantageous to him to learn the trade. This then was not an indiscriminate leave to serve any person, but a particular consent to a particular service ; and this is the plain line of distinction between all the cases ; which it is to be hoped will make an end of all such questions in future. Perhaps it would have been more correct for the sessions to have found the fact of such particular consent, instead of only finding the evidence of it, as they have done. And if any thing were likely to turn upon it in this case, it should be sent down to them again to find that fact. But I do not know what advantage could accrue from thence to the respondents ; for in effect the sessions have drawn that conclusion, and upon these premises I do not see how they could have drawn any other.

GRÖSE, J. I am decidedly against sending this case down again to sessions, the only consequence of which would be to enhance expence : For I think that they clearly meant to find the fact of the original master's consent to the second service, and by their adjudication they have in effect found that fact ; I have reconsidered what I said the other day in *The King v. Crediton(b)*, and am satisfied that it is right ; namely, that whether there be a consent to a particular service or not is properly a question of fact for the sessions to determine. In the former case they virtually negatived the consent, as here they have found it ; and I think the evidence warrants their conclusion.

LE BLANC, J. The sessions having stated the fact, and drawn their conclusion, is equivalent to their having expressly found an assent by the original master to the particular service with *Battishill*.

Order of sessions confirmed(u).

Pearson v. Rawlings.

1 East, 77. Nov. 22, 1800.

A prisoner who is supersedeable, for want of filing a bill against him in time, waives the irregularity by afterwards pleading.

THE *latitat* was returnable on the first return of *Easter Term* last; a declaration was delivered as of the 30th of *June*, but no bill was actually filed till the 3d of *July*, the day after term. The defendant, a prisoner, not being aware of the irregularity(b) at the time, pleaded in person on the same 3d of *July*: And being still in custody on mesne process, obtained a rule in this term calling on the plaintiff to shew cause why he should not be discharged out of custody, on the ground that a prisoner once supersedeable is always so.

Erskine and *Gibbs*, against the rule, contended that the defendant had waived the irregularity by pleading afterwards.

Garrow and *Lambe*, contra, relied upon the general rule above stated, which was recognized in *Rose v. Christfield*, 1 Term Rep. 591. and admitted to apply to all cases where the prisoner remained in the same custody, and under the same process, which was the case here. And they said, that if such an implied waiver were admitted as an exception, the benefit of the rule which had been introduced for the sake of prisoners would be done away.

LORD KENYON, C. J. The rule alluded to is grounded upon a supposition that there has been some irregularity in the prior proceedings, which the defendant has not done any act to preclude himself from taking advantage of. But if he have afterwards waived the irregularity, then the rule no longer attaches upon him. Now it is the universal practice of the Court, that where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity and object to it. Justice requires that that rule should be general in its operation, having in view the advancement of right. And however inclined we may be to favor persons in the situation of the defendant, yet we must not go the length of breaking in upon the general practice of the Court.

Per Curiam,

Rule discharged(c).

The King v. The Corporation of Bedford.

1 East, 79. Nov. 22, 1800.

If it appear with sufficient certainty to the Court that a person has been elected mayor of a borough on the day appointed by the usage, who is not qualified to accept the office, by reason of his not having previously taken the sacrament within the time limited by law, they will grant a *Mandamus* to the electors to proceed to a new election under the st. 11 Geo. 1. c. 4. s. 2. as if no election had in fact been made.

WILSON moved on a former day for a *Mandamus* directed to the recorder,

(a) Vide *Rex v. Chipping Warden*, 8 Term Rep. 108.

(b) By rule of Court, H. 26 Geo. 3. the plaintiff must declare against a prisoner before the end of the next term after the return of the process. Rules and orders of B. R. p. 87.

(c) In *Walter v. Stewart*, 3 Wils. 455. The Court held that no advantage should be taken by a prisoner of an irregularity in not declaring against him in time, by reason of an impending treaty between him and the plaintiff for an accommodation.

deputy recorder, aldermen, bailiffs and commonalty of *Bedford* to proceed to the election of a mayor, the office being vacant. The affidavit on which the motion was grounded set forth the constitution of the borough, which was a borough by prescription, consisting of a mayor, recorder, &c. and that by the usage the mayor is annually elected on the first *Monday* in *September*, and is sworn in and enters upon his office on the *Michaelmas-day* following. That on the first of those days, *Francis Green*, a Burgess of the borough, was duly nominated and elected into the office of mayor agreeable to the custom for the year ensuing, and notice was given to him to attend and be sworn in on the *Michaelmas-day* following; but that he did not attend, and refuses to take upon him the office.

It was suggested(a) at the time of the motion made that *Green's* reason for such refusal was, because he had not taken the sacrament within one year previous to his election, as required by the st. 13 Car. 2. st. 2. c. 1. s. 12. and therefore would not subject himself to the penalties imposed by law on persons taking upon themselves such offices without that qualification. And it was contended, that as the statute declared the election void under those circumstances, the Court would consider the case the same as if the borough had omitted altogether to make any election on the proper day, in which case the only remedy was by application to this court for a *Mandamus* to them to proceed to an election, under the st. 11 Geo. 1. c. 4. s. 2.(b), and that they were desirous in the present instance to have such *Mandamus* rather than to be at the expence of litigating the question with *Green*. It was added, that writs of *Mandamus* had issued under similar circumstances to the corporations of *Liverpool*, *Thetford*, and other places.

The Court, however, expressed great doubt whether they could with propriety grant the writ under the circumstances disclosed by the affidavit in this case. For all that appeared was, that *Green* had been duly elected according to the usage of the borough; in which case the office of mayor was already full, and there could be no other mayor legally elected. That supposing the election to have been properly made, the refusal of *Green* to take upon him the office availed nothing against the validity of his appointment, but he was indictable for such refusal. Under such circumstances it would be nugatory to grant a *Mandamus* to proceed to that which would be a void election; and it would involve the borough in difficulties, since all acts done under the new mayor would be void. The Court, therefore, thought it better in the first instance to grant a rule calling on *Green* and the late mayor of the borough of *Bedford* "to shew cause why a writ of *Mandamus* should not issue to them commanding the said late mayor to swear *Green* into the office of mayor of the said borough, and commanding *Green* to appear before the said late mayor and take the oaths, &c. and thereupon to take upon himself the office of mayor of the said borough for the remainder of the present year." Such a rule was accordingly granted; and on this day

Gibbs, on behalf of *Green*, shewed for cause the reason above suggested, namely, his incapacity to take upon himself the office by reason of his not having before duly qualified himself by taking the sacrament, in which case the stat. of Car. 2. avoids the election. And

The Court deeming this a sufficient answer,

Wilson again renewed his first application for a *Mandamus* to the members above named of the borough to proceed to an election of mayor; which was now

Granted accordingly.

(a) But this did not appear upon the affidavit at this time.

(b) Vide *Rex v. The Mayor, &c. of Cambridge*, where the *Mandamus* was granted after an election, it being colorable and void. 4 Burr. 2008.

Jones v. Price.

1 East, 81. Nov. 22, 1800.

No objection can be made to the insufficiency of an affidavit to hold to bail in not negating a tender of the debt in bank notes, after the bail have justified.

A RULE was obtained calling on the plaintiff to shew cause why an exoneretur should not be entered on the bail piece, and the plaintiff pay the costs of putting in special bail and of this application. This was grounded on an objection to the affidavit to hold to bail, which had omitted to negative a tender of the debt in bank notes by the defendant, pursuant to the requisition of the stat. 37 Geo. 3. c. 45 s. 9.

Abbott shewed for cause, that the defendant had voluntarily put in special bail at the return of the writ, justified the bail, although they were not excepted to, and drawn up the rule for the allowance and served it on the plaintiff; within a week after which he had applied for the present rule. This he contended was a waiver of any informality in the process, and cited *Chapman v. Snow*, 1 Bos. & Pull. 132, as in point.

Lawes in support of the rule, said this was an application on behalf of the bail, who were obliged to justify before they could be heard; and they had taken the objection in reasonable time afterwards.

Lord KENYON, C. J. This is a clear waiver of the objection, and did not want the authority of a precedent; that however cited is in point. Application should have been made in the first instance before the bail had justified: instead of which the defendant has lain by, and suffered the plaintiff to incur additional expence on a supposition that all the proceedings were right, and now comes to complain: but he has adopted the process, and shall not now take advantage of any defect in it(a).

Per Curiam,

Rule discharged with costs.

The King v. The Inhabitants of Ilminster.

1 East, 88. Nov. 22, 1800.

The sessions finding that the pauper was legally appointed governor of the work-house in *I.* at an annual salary, and that the office of governor is a public annual office, and that the pauper served it for a year; held that a settlement was thereby gained in *I.*

TWO justices by an order removed *Joseph Grigg*, and his wife and children, by name, from *Honiton* in the county of *Devon* to *Ilminster* in the county of *Somerset*. The Sessions on appeal confirmed the order subject to the opinion of this Court on the following amended(a) case: The pauper was le-

(a) In *Norton v. Danters*, 7 Term Rep. 375. the defendant's voluntarily giving a bail bond before an actual arrest was deemed a waiver of the objection to the affidavit to hold to bail. So in *Desborough v. Coppinger*, 8 Term Rep. 77. The Court held that the objection should be made in a reasonable time after the error committed, and that it was too late to take it after judgment by default and notice of a writ of enquiry.

(a) In the first case sent up to this Court it was stated "that the pauper was appointed in 1779 governor of the workhouse in the parish of *Ilminster* for the management and government of the poor therein, under the annual salary of 20*l.*, which office he continued to serve for five years, and regularly received his salary during that period, when he was dismissed. That at the time of his appointment, he was put by the parish officers into possession of certain apartments in the workhouse, appointed for that purpose, and which had been occupied by the former governor." This case being considered by the Court as defectively stated was sent back to the sessions to be restated; and they returned the same case again with this addition "That at the time of his appointment the pauper was put by the parish officers (in

gally appointed in the year 1779 governor of the workhouse in the parish of *Ilminster*, at an annual salary of 20*l.*, which office he continued to serve for

conjunction with two of the principal people of the town who acted as inspectors of the accounts and conduct of the overseers" into possession" &c. (as before).

Upon the first occasion, in M. 40 Geo. 3.

East, in support of the order of sessions, contended that this was such an office or charge within the meaning of the st. 3 W. 3. c. 11. s. 6. as would enable the pauper to gain a settlement by having served it for a year. The principle on which a settlement is gained by serving an annual office in the parish is the notoriety to the parish of the residence of the party, *Re v. Bicham*, 1 Stra. 411. and no employment can be more notorious in its nature than this, to which the pauper was appointed by the parish itself. The only questions then are, whether this employment be in its nature a public office, and whether the pauper served it in his own right, or merely as a deputy for others. The origin of this appointment is derived from the st. 9 Geo. 1. c. 7. s. 4., whereby it is enacted, "that for the greater ease of parishes in the relief of the poor, it shall be lawful for the churchwardens and overseers with the consent of the major part of the parishioners or inhabitants in vestry or other parish or public meeting for that purpose assembled, or so many as shall be so assembled on usual notice given, to purchase or hire any house or houses in the same parish &c., and to contract with any person for the lodging, keeping, maintaining and employing all such poor, &c. (i. e. whose names are registered in a book) and there to keep, maintain and employ all such poor persons, and take the benefit of their work, labour and service." Now here it is stated, that the pauper was appointed to the management and government of the poor in the workhouse, which could not have been legally done by virtue of any other authority than what is conferred by this act; and therefore the Court will rather presume that he was so legally appointed, than that the parish officers took upon themselves* without any authority to delegate part of their trust to him. It is also stated, that the pauper was appointed to this trust under an annual salary, which the parish officers could not take upon them to grant, and which could only be legally attributed to the exercise of the power conferred by the act. Then the salary being annual, the appointment must be taken to be of equal duration; and being so made, it was not in the power even of the parish at large, much less of the parish officers alone, to have dismissed the pauper before the end of the year, except perhaps for malpractice or abuse of trust. The st. 9 Geo. 1. was the first general act for the erecting workhouses; though some few were erected before by local acts of parliament. The intention of the legislature was to create a new public officer with new powers, which in one respect exceed that of overseers of the poor; for the person contracted with for the management and government of the poor may also engage to take the benefit of their labour in the workhouse, though in this instance the contract did not extend so far. The very nature of such an appointment imports a public office, being analogous to the duties of an overseer of the poor. In the case of *R. v. Bicham* before mentioned, the appointment of a collector of the duties on births and burials imposed by the stat. 6 & 7 W. 2. c. 6. holden under the commissioners for managing such duties, was deemed a public annual office, by serving which a settlement might be gained. But the legislature themselves have considered this trust as a public office; for in another statute passed in *pari materia*; though subsequent to the appointment of the pauper, the stat. 22 Geo. 3. c. 83. reciting the former act, and that for want of proper regulations and due control, over the persons engaged in such contracts, the act had not the desired effect; an option is given to adopt another form of appointment, with greater control over the appointee; and the statute proceeds to call him an officer (naming him governor of the workhouse) and the appointment an office (s. 14. and schedule No. 7.) although with less power than under the former act; and by this latter act such governor of the workhouse "shall have the care, management and employment of the poor to be sent thither, and be allowed a salary or wages "for his trouble." This serves to explain the intention of the legislature in the former act, if there were any doubt of it upon the face of the act itself. Now it appears that the trust committed to the pauper was exactly of the same description as that conferred by the last statute, and by the same name; and such an appointment is therein expressly denominated an office. Then the pauper having served such an office for above a year in *Ilminster* gained a settlement in that parish.

Lens, *Serjt. Heath*, and *Lyon* were to have argued on the other side.

The Court however thought the facts were not sufficiently stated to raise the question; mere evidence being stated, and not the facts by whom, and in what manner, and under what authority the appointment of the pauper was made, and Lord Keayon, C. J. after the case had been amended the first time, intimated a strong opinion that as the facts then appeared, no settlement could be gained; considering the appointment of the pauper merely in the nature of a servant to the parish officers, by whom he might have been dismissed at any time within the year.

* On the first amended case the concurrence of two of the principal payers, who acted by delegation for the rest under the name of inspectors, was stated.

† The 13 and 14 Car. 2. c. 12. s. 4, &c. was confined to *London* and *Westminster*, and parishes within the bills of mortality. It was further enforced by st. 23 Car. 2. c. 18.

five years, and regularly received his salary during that period. The said office of governor is a public annual office; and the Sessions were of opinion that he gained a settlement in *Ilminster*. When this case was called on

The Court said, that the facts now stated precluded any further discussion; for the Sessions had found that the pauper had served a public annual office in the parish, to which he was legally appointed.

Per Curiam,

Order of Sessions confirmed.

Clapp and *East* were to have argued in support of the order; but no counsel appeared for the appellants.

Clarke v. Bradshaw.

1 East, 86. Nov. 24, 1800.

In *scire facias* on the recognizance of bail and *scire feci* returned, it is sufficient to fix the bail if they were summoned before the rising of the Court on the return day. But the Court will stay proceedings against both the bail, on payment of the sum sworn to and costs, although less than the damages recovered, or than the sum named in the process.

A RULE was obtained calling on the plaintiff to shew cause why the proceedings on the *scire facias* against the bail in this cause should not be set aside for irregularity; the question being whether the bail had been summoned in time. The plaintiff, having obtained judgment in Trinity term last against the principal, sued out a *capias ad satisfaciendum* returnable the last return of that term, on which *non est inventus* was returned. On the 29th of October, a *scire facias* issued on the recognizance of the bail returnable the 6th of November; and on the 31st of October, the writ was left in the office, and a warrant obtained thereon of the same date; but the bail were not summoned till between seven and eight o'clock in the evening of the 5th of November, the day before the return of the writ; and they did not render their principal till the 10th of November.

Erskine, *Garrow*, and *Marryat*, shewed cause, and contended that the proceedings were regular. A plaintiff has two methods of proceeding against the bail after a *capias ad satisfaciendum* issued against the principal and *non est inventus* returned; either by issuing two writs of *scire facias* and two *nihil*s being returned thereon, or by issuing one *scire facias*, which must lie four days exclusive in the office before the return, and a summons thereon being served on the bail, and *scire feci* returned. But the service of such summons is a mere matter of form, and if it be done at any time before the rising of the Court on the return day of the writ, it is sufficient. Such a summons may indeed seem to be nugatory for the purpose of giving notice to the bail to surrender their principal, but matters of practice are of positive regulation, and there is at least as much advantage to the bail in this method of proceeding as in the other by two *scire facias* and two *nihil*s returned. The true reason of the practice in either case is stated in *Hunt v. Coze*, 3 Burr. 1360, to be this, that the suing out of the *capias ad satisfaciendum* is the real notice to the bail that the plaintiff looks to the body of the principal as his security, and the bail are bound to search the office to know when it issued and is returnable, in order that they may have his body ready to render at the return of the writ.

Gibbs, *Perceval*, and *Espinasse*, contra. The mode of proceeding adopted in this case is full as disadvantageous to the bail as that by two *scire facias* and two *nihil*s returned, although it professes to be more fair and reasonable; and the objection is, that that has not been done, which the practice professes to require, namely to give the bail notice, (by which must be understood reasonable notice,) to render the principal. According to the practice contended

for the summons may be rendered altogether nugatory by being withheld till the last moment of the sitting of the Court on the return day: but if that were so, the practice itself would never have existed, as it could only tend to incur a fruitless expence and loss of time. Besides, the contrary was ruled in *Webb v. Harvey*, 2 Term Rep. 757, where the Court set aside proceedings in *scire facias* against the bail upon *scire feci* returned, because it appeared that they were only summoned an hour before the rising of the Court on the return day; considering that the summons was intended to afford them a reasonable warning to take their principal and render him before the return of the writ. This is also consonant to what was ruled in *Wright v. Page*, 2 Black. R. 837. Now here it appears that the summons was fraudulently kept back for several days after the writ was in the office; and only served the evening before the return day, which could only be done for the purpose of preventing the bail from availing themselves of the notice to render the principal in time.

LORD KENYON, C. J. There was certainly a mistake in the report of the case of *Webb v. Harvey*, in stating that the notice to the bail was before the rising of the Court on the return day. On application afterwards by Mr. Impey to the Master for information on the point, he revised the affidavits (a) on which the rule was pronounced, and found that the summons was not served on the bail till half past three o'clock on the return day, which was after the rising of the Court; on which he corrected his note; and the practice stands accurately stated in the last edition of Mr. Impey's book on the subject. And I find it is considered as the settled practice of the Court, that if the bail be summoned any time before the rising of the Court on the return day of the writ, it is sufficient. Such being the case it is unnecessary to inquire into the reason of the thing; yet if it were traced to its source perhaps it might not appear so absurd as is supposed. Bail are in law considered as the gaolers of the principal, and to have him always in their custody; they undertake that he shall be forthcoming when called upon: this is properly at the return of the *capias*. Whatever time they are allowed afterwards to render him is by the indulgent practice of the Court: this is either upon two writs of *scire facias* returned nihil upon each, or upon one *scire facias* and a summons and a return of *scire feci* after the writ has lain a certain time in the office. The bail are bound to watch these proceedings, and to have their principal ready to render at the plaintiff's call. Indeed, unless they live in *Middlesex* how can the sheriff serve the bail with notice. It is sufficient, however, to say that the practice as I have stated it was long ago settled, as appears by a case in *Strange* (b). And I profess to found my judgment on the settled practice, and not on any reasoning of my own.

LAWRENCE, J. (c) The case in *Strange* settled the practice which has been continued ever since. There must have been a misapprehension of the opinion of the Court in the case of *Webb v. Harvey*: and that appears by referring to the case of *Pool v. Wills* there cited, on the authority of which the rule was made absolute for setting aside the proceedings against the bail: in which latter it is stated, that the bail were not summoned till *after* the rising of the Court on the return day; which could not have been any authority for the

(a) Having since referred to the original affidavits filed, I find that they were contradictory upon this point, which may account in part for the error; but the affidavit on the part of the bail on which the rule was obtained was as his Lordship stated it to be, on which it is probable that the Court decided; thinking that it had not been distinctly answered by the affidavit of the plaintiff, from whence the fact as stated in the report was taken.

(b) *Obrian v. Frazier*, M. 12 Geo. 1. 1 Stra. 644. The reporter refers to a subsequent case of *Bland v. Perry*, T. 4 Geo. 2. where the same point was ruled again on great debate. And in *Williams v. Mason*, M. 4 Geo. 2. it was settled that the *scire facias* must lie four days in the office, as well where *scire feci* is returned, as nihil.

(c) This part of the case was determined on Monday the 17th of November. Mr. Justice Lawrence was absent when the case was brought on again upon another rule.

decision in the principal case if the bail there had been summoned *before*. Besides, it is apparent if we advert to the reason of the thing, that the time of serving the bail with notice cannot be material, provided it be done before the rising of the Court on the return day. The summons is the act of the sheriff, and the service of it on the bail is in order to warrant his return to the Court of *scire feci*. The sheriff may indeed submit to receive the directions of the party as to the time for serving it; but still it is the act, not of the party, but of the sheriff through the medium of his officer. All these proceedings are in truth matter of indulgence to the bail. It is indulgence to them to permit them to render the principal after the return of the *capias ad satisfaciendum* against him; and therefore they cannot complain that they are not allowed still greater indulgence.

Per Curiam,

Rule discharged.

Gibbs then obtained a rule to shew cause why the proceedings against the bail should not be stayed, upon payment of the debt sworn to and the costs to be taxed by the Master.

Erskine, Garrow, and Marryatt, now shewed cause. They stated that the action was by bill and the *ac etiam* for 4000*l.*: that the sum sworn to for which the defendant was holden to bail was only 1900*l.* 10*s.* but the sum recovered was 2549*l.* 10*s.*; and they contended, 1st that the bail were liable to the extent of the sum recovered, being within the amount of the sum named in the process. *Martin v. Moor*, 2 Stra. 922, or if not, 2dly, that each of the bail were separately liable to the extent of the sum sworn to; and therefore both together were liable to an amount which would cover the damages recovered and costs. *Dahl v. Johnson*, in C. B. 1 Bos. & Pull. 205, vide *Calverag & ux. v. De Miranda, Barnes*, 2d edit. 76. S. P.

LE BLANC, J. observed, that in C. B. the bail enter into a recognizance for double the amount of the sum sworn to.

The Court on consideration of the rule of Court, E. 5 Geo. 2.(a) and of the case of *Jackson v. Hassel*, Doug. 330, and of another case, furnished by the Master, of *Tranel v. Rivaz* and another, Tr. 16 Geo. 3.(b) (which Lord Kenyon read from the Master's note) said, that it was absolutely of course to grant the application. That the bail to the action were altogether only liable to the amount of the sum sworn to and costs; though as between them and the plaintiff that sum might be levied upon either of them. But the plaintiff could not recover it twice over from the bail, by taxing each separately to that amount.

Rule absolute(c)(1).

(a) Rules and orders of K. B. 10.*

(b) *Tranel v. Rivaz* and another, T. R. 16 G. 3. B. R. "In an action on the recognizance of bail, leave was given to stay proceedings on payment of the sum sworn to, viz. 200*l.* the costs in the original action, and the costs against the bail, and of the application; although on cause shown it appeared that the defendant was gone abroad, and that the plaintiff had recovered 500*l.*."

(c) The distinction is between bail to the action and bail to the sheriff; the latter are liable to the whole debt (without regard to the sum sworn to) and costs, provided the amount does not exceed the penalty of the bail-bond. *Stevenson v. Cameron*, 8 Term Rep. 28. *Orton v. Vincent*, Cowp. 71. So in C. B. *Mitchel v. Gibbons*, 1 H. Blac. 76. So the sheriff is liable to the whole amount if he discharge the defendant without taking a bail-bond. *Stevenson v. Cameron* supra: or generally, upon an attachment against him for not bringing in the body. *Foylds v. Mackintosh*, 1 H. Blac. 23. *Heppel v. King*, 7 Term Rep. 370.

(1) Vide *Jacob v. Bowes*, 6 East, 312.

* The reason of making this rule which is particularly worded may be gathered from the case of *Genbaldo v. Cognoni*, M. 3 Ann. Balk. 102. where Lord Holt held, that if the sum recovered exceeded the sum in the *ac etiam*, the bail were not liable at all, because their recognizance was to answer the condemnation, which in that case could not be.

Parr v. Eliason and Others.

1 East, 92. Nov. 24, 1800.

[S. C. at Nisi Prius, 3 Esp. 210.]

A bill of exchange payable to *A.* or order which was legal in its inception, was, by him indorsed to *B.* for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to *B.*'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate: held that the indorsement of *A.* to *B.* on an usurious account did not avoid the bill in the hands of an innocent holder by virtue of the stat. of usury; and that *B.*'s assignees being clothed with the rights of such innocent indorsee were entitled to hold the bill against *A.*, though as between *A.* and *B.* the security was void. An agreement on discounting a bill that the party should take in part payment another bill which had time to run as cash, although the full discount was taken, is usurious.

IN trover for a bill of exchange, it appeared that the plaintiff, residing at *Liverpool*, in 1799 became possessed of the bill in question, which was drawn by a correspondent in the *West Indies* upon a house in *London* in favour of the plaintiff or his order, and accepted payable on the 27th of *July* 1800. The plaintiff having occasion to raise money applied to the house of *Persent* and *Bodeker* on the 19th of *June* 1799 to discount the bill, which they agreed to do and took the full discount; stipulating however that the plaintiff should in part payment of the money take their acceptance of a bill to be drawn by him on them at three months date, which was done accordingly; and at the same time the plaintiff indorsed the original bill in question to them. *Persent* and *Bodeker* became bankrupts in *September* 1799, having first negotiated the bill; and the same was afterwards paid to the defendants, as assignees under their commission, in satisfaction of a debt due to the bankrupts' estate. It also appeared, that after the bankruptcy the plaintiff was obliged to take up and pay the bill drawn by him upon the bankrupts and accepted by them. At the trial before Lord *Kenyon* at *Guildhall*, it was contended on the part of the plaintiff, that the indorsement of the bill by him to the bankrupts for an usurious consideration avoided the security by the stat. 12 Ann. st. 2. c. 16. whereby all bonds and assurances for "payment of any money to be lent upon usury, &c. shall be "void;" which has been holden to avoid securities of this kind even in the hands of innocent indorsees for a valuable consideration without notice. *Lowe v. Waller*, Dougl. 736, and *Bowyer v. Bampton*(a). But Lord *Kenyon* was of opinion that the assignees of the bankrupt had a right to protect their possession of the bill by the title of the party from whom they received it in payment, who was an innocent holder; and that the bill being valid in its inception the statute of usury did not apply to the present case: and thereupon the plaintiff was nonsuited. A rule having been obtained on a former day in this term, calling on the defendants to shew cause why the nonsuit should not be set aside and a new trial had,

Law, and *Wood*, were now called upon to support the rule. It is clear that the consideration for indorsing the bill, as between the plaintiff and the bankrupts, was usurious, and if it had come to the hands of the assignees immediately from the bankrupts, their title must have been affected by the usury. But though the defendants may be considered as standing in the situation of innocent holders, yet the instrument itself is avoided by the statute of usury, and no title could be conveyed by the plaintiff's indorsement. The bill being originally made payable to the plaintiff or his order, without his indorsement it was not negotiable, nor was any assurance in law to any other per-

(a) 2 Stra. 1155, upon the Gaming Act. 9 Ann. c. 14.

son: then the usurious consideration was co-temporaneous with the first existence of the instrument as an assurance to the bankrupts. Suppose the bill had been drawn by the plaintiff himself payable to his own order, and he had agreed to indorse it for an usurious consideration, it cannot be pretended but that it would have been void by the statute; this then is the same in effect; for every indorsement is as it were a new drawing of the bill(a); and the assignees, though innocent holders, must in any action upon the bill derive title through the first indorser. If the bankrupts could not have maintained an action against the plaintiff upon his indorsement on account of its being an assurance for an usurious consideration, neither could any subsequent holder according to the construction put upon the statute. Then it is inconsistent to say that though no action could be maintained against the first indorser, yet that title may be made through him to another.

Erskine, Gibbs and Taddy, contra, were stopped by the Court.

Lord KENYON, C. J. There is nothing in the point; and it might be attended with serious consequences if it could be supposed that the Court entertained any doubt upon it. The commerce of this country subsists upon paper credit; but if this action could be maintained no man would be safe in taking even a bank of *England* post bill payable to order; for however just and legal it might be in its inception, if the payee passed it to another for an usurious consideration, it is now contended that it would be void in the hands of any subsequent innocent holder, and might be recovered from him. Where the bill itself in its original formation is given for an usurious consideration the words of the statute of Anne are peremptory that the assurance shall be void; and the construction which has been put upon the statute has gone far enough in saying that it shall be avoided even in the hands of an innocent indorsee without notice. But no case has gone the length now contended for, nor do the words of the statute require it. Here the bill was fair and legal in its concoction, and therefore no advantage can be taken of what happened afterwards against *bona fide* holders(1). The defendants stand clothed with the rights of the party from whom they received the bill in payment, and must therefore be taken to be holders for a valuable consideration without notice. I referred at the trial to a case in *Siderfin*(b), which is a very leading authority, wherein it is said, that though a conveyance may in its creation be fraudulent and voidable as against a purchaser, yet it may become valid by matter *ex post facto*: and that a person to whom a conveyance was made which was voluntary in its creation, and therefore voidable, might be protected by the title of a subsequent purchaser for a valuable consideration who had acquired an interest in it.

Per Curiam,

Rule discharged(c)(2).

(a) Vide 2 Burr. 674.

(1) Vide *Daniel v. Cartony*, 1 Esp. 274. *Bush v. Livingston*, 2 Caine's Cas. in Error 66. *Folts v. Mey*, 1 Bay, 473.

(b) *Prodders v. Langham*, 1 Sid. 138. See also *Louthen v. Carlton*, Cas. in Eq. temp. Id. Talbot, 187. Where a purchaser for a valuable consideration, but with notice, protected himself by making title through a third person whose title could not be impeached by notice of the prior defect. And several cases in 2 Vern. 169, where purchasers for valuable consideration without notice have protected themselves by getting a legal title, though obtained originally by undue means.

(c) Vide *Ferrall v. Sheen*, 1 Saund. 294, that a bond which was good when made is not avoided by a subsequent usurious contract for delaying the day of payment of it. And vi. n. 1. by Serjt. Williams, where all the cases are very ably collected; and *Cuthbert v. Haley*, 8 Term. Rep. 390.

(2) [A similar point has been decided in Massachusetts, where, as in England, a promissory note, made on a usurious contract, is void even in the hands of a bona fide holder for value. (See 4 Mass. R. 156. 161, 10 do. 121. 123.) It was ruled in *Knights v. Putnam*, 3 Pick. 184, that usury between the indorser and indorsee in the transfer of a negotiable note, affects only the promise of the indorser, and cannot be set up as a defence to an action by the indorsee against the maker. In Connecticut, however, the decision of the same point has been directly the other way. See *Lloyd v. Keach*, 2 Con. R. 175.—W.]

Vandyck and Others v. Hewitt.

1 East, 96, Nov. 24, 1800.

The premium paid on an illegal insurance to cover a trading with an enemy cannot be recovered back though the underwriter cannot be compelled to make good the loss.

THE plaintiff declared upon a policy of insurance on goods at and from *London to Embden or Amsterdam*, at a premium of ten guineas per cent. to return five upon their arrival at the place of destination; with an averment that the insurance was made for the benefit of certain persons therein named; and then declared as upon a loss by capture in the course of the voyage insured. The declaration also contained counts for money paid, and for money had and received.

The goods were shipped on board a *Prussian* neutral vessel, on account, partly of the plaintiffs who were naturalized foreigners resident in *London*, and partly of certain other persons, aliens, then resident in *Holland*. At the trial at *Guildhall*, the insurance itself was abandoned on the ground of its being intended to cover a trading with an enemy's country, *Holland* being at the time of such insurance in a state of hostility with this kingdom; and therefore falling within the decision of the case of *Potts v. Bell*, 8 Term Rep. 648, but it was contended that the plaintiffs were entitled to recover back the premium, because the policy never attached, and consequently the defendant's risk never commenced. Lord *Kenyon* permitted a verdict to be taken for the plaintiff for that amount, with liberty to the defendant's counsel to move to set that aside, and to enter a verdict for the defendant. A rule *nisi* was accordingly obtained on a former day in this term for that purpose; against which

Erskine, Park, and J. Warren, now shewed cause. Here was no fraud intended, as in the case of smuggling transactions. The assured are neutral foreigners, who have paid money to the defendant for a certain consideration the benefit of which they are precluded from receiving by a rule of public policy: it is but just, therefore, that as the insurance never attached, and the underwriter has not incurred any risk, he should not be suffered to retain the consideration, *Tyre v. Fletcher*, Cowp. 668. Admitting the contract to be illegal, yet according to *Lacausade v. White*, 7 Term Rep. 535, the party who has deposited money upon an illegal consideration, (as in that case upon an illegal wager) may recover it back again even after the event is determined against him. They also referred to the case of *Nesbitt v. Whitmore* in *Easter* term last, where this point was agitated, and where finally the premium was returned(a).

Law and Garrow, contra were stopped by the Court.

LORD KENYON, C. J. There is no distinguishing this on principle from the common case of a smuggling transaction. Where the vendor assists the vendee in running the goods to evade the laws of the country he cannot recover back the goods themselves, or the value of them(b). The rule has been set-

(a) In that case, under similar circumstances with the present, *Giles* for the plaintiff admitted that he could not recover the loss upon the policy since the determination in *Bell v. Potts*: but he contended that the plaintiff was entitled to take a verdict for the premium, which had not been paid into Court. This was resisted by *Park* for the defendant, on the ground that no such question had been reserved at the trial. *Et per Curiam*. That point not having been made, and the jury not having assessed any such damages, but only the amount of the loss to be recovered, supposing the plaintiff to be entitled to it in point of law we cannot now interpose any other sum in lieu of their verdict. Whereupon *Giles* prayed leave to amend the verdict by the Judge's notes. The Court with much reluctance, and with a view to a compromise, granted a rule to shew cause. And afterwards it was agreed between the parties, that the premium should be repaid, without costs on either side.

(b) Vide *Clugas v. Penaluna*, 4 Term Rep. 466. and *Waynall v. Reed*, 5 vol. 599

bled at all times, that where both parties are *in pari delicto*, which is the case here, *potior est conditio possidentis*.

LE BLANC, J. The ground of the determination in *Lacausade v. White* has been since very much canvassed in a latter case of *Howson v. Hancock*, 8 Term Rep. 575, where it was considered that money deposited upon an illegal wager, and paid over to the winner, could not be recovered back from him.

Per Curiam,

Rule absolute for the verdict to be entered for the defendant(f)(1).

Johnson and Another v. Collings.

1 East, 98. Nov. 25, 1800.

A mere promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date for the amount of his demand he should then have the money and would pay it, does not amount in law to an acceptance of the bill when drawn; and an indorsee for a valuable consideration, between whom and the drawee no communication passed at the time of his taking the bill, can neither recover upon the count as for an acceptance, nor on the general counts as for money had and received, &c.

THE plaintiffs declared in the first count against the defendant as the acceptor of a bill of exchange drawn by one *Ruff*, dated the 25th of October 1799, and directed to the defendant, whereby he was required two months after date to pay to the order of the drawer 23l. 10s. 6d. value received, which bill was afterwards indorsed by *Ruff* to one *Jane Ruff*, and by her to the plaintiffs. There were other general counts for money had and received, money paid, and upon an account stated. To which there was a plea of the general issue.

At the trial before *Le Blanc*, J. at the last *Worcester* assizes, it appeared in evidence that *Ruff*, having furnished goods to the defendant to the amount of the bill, applied to him for payment, when the defendant excused himself at that time, but said that if *Ruff* would draw on him a bill at two months from the 25th of October for the amount he should then have money and would pay it. *Ruff* afterwards drew the bill in question, dated 25th of October at two months, but it never was in fact presented to the defendant for his acceptance; nor did he ever in fact accept it, otherwise than as is stated above. It was said at the trial to be the practice at *Bristol*, where the defendant lived, not to accept bills or to have them presented for acceptance. *Ruff*, to whose own order it was made payable, having indorsed the bill, afterwards passed it to the plaintiffs in discharge of an old debt: but no communication took place at the time between the plaintiffs and the defendant. After this and before the bill became due *Ruff* became a bankrupt; and when the bill was due the plaintiffs presented it to the defendant for payment, who then declined it on account of *Ruff's* bankruptcy without an indemnity, admitting

(f) So in *Lowry v. Bourdieu*, Dougl. 468, the Court held, that the assured could not recover back the premium paid upon a gaming policy without interest, which is illegal within the stat. 19 Geo. 2. c. 37. [See also *Morck v. Abel*, 3 Bos. & Pull. 85. *Lubbock v. Potts*, 7 East 456. *McCallum v. Gourlay*, 8 Johns. Rep. 147.]

(1) [In Pennsylvania, the law is now settled, whatsoever doubts may have formerly existed, that no action can be maintained to recover a sum of money alleged to have been lost by the defendant to the plaintiff upon a wager or bet. *Edgell v. McLaughlin*, 6 Wh. 176. But the money, if deposited with a stakeholder, may be recovered by the better on a horse-race either from the winner or stakeholder. *App v. Coryell*, 3 P. R. 494. This last case, however, was decided under an act of assembly especially applicable to that particular species of gambling. The general rule stated in the case is the text is well established in Penn. Money paid over voluntarily, in pursuance of an illegal bet, cannot be recovered back. And so stands the rule in regard to all voluntary payment of money upon contracts which are void merely because of their being *mala prohibita*. *McAllister v. Hoffman*, 16 S. & R. 147. *Speise v. McCoy*, 6 W. & S. 435.—W.]

however that he owed the money either to *Ruff* or to *Ruff's* assignees. The learned Judge was of opinion that a mere promise, such as this, to accept a bill when it should be drawn, at least unless made to a third person, or accompanied at least with circumstances which might induce a third person to take the bill, (which was not the case here,) did not amount to an acceptance, and therefore the plaintiffs were not entitled to recover on the first count. And that as there had been no communication between these parties at the time, nor any consideration having passed as between them, there was no evidence to warrant a finding for the plaintiffs on either of the money counts: whereupon he directed a nonsuit to be entered, with liberty to the plaintiffs to move to set it aside and enter a verdict for the amount of their demand, if the Court should be of opinion that they were entitled to recover on either of the counts. A rule nisi was accordingly obtained for this purpose on a former day.

Williams, Serjt., who was now to have shewn cause, was stopped by the Court.

Wigley and *Clifford* in support of the rule. 1st. A promise to accept a bill when drawn amounts in law to an acceptance. In *Pillans and Rose v. Van Mierop and Hopkins*, 3 Burr. 1063, the plaintiffs having advanced money to one *White* upon the faith of a written assurance by letter from the defendants "that they would accept such bills as the plaintiffs should in a month's time draw upon them for 800*l.* upon the credit of *White*," the Court after much deliberation held that whether it were an actual acceptance, or a loan to *White* upon the credit of the defendants, it would equally bind the latter. But Lord *Mansfield* there said, Ib. 1069, "This amounts to the same thing as an acceptance. I will give the bill due honor is in effect accepting it. If a man agree that he will do the formal part, the law looks upon it, in the case of an acceptance of a bill, as if actually done." *Wilmot*, J. said, Ib. 1073, "An agreement to accept a bill to be drawn in future would, as it seems to me, by connexion and relation bind on account of the antecedent relation. And I see no difference between its being before or after the bill was drawn." *Yates*, J. said, Ib. 1074, "This agreement to honor the bill was a virtual acceptance of it." Again, "A promise to accept is the same as an actual acceptance." *Aston*, J. said, "The defendants have undertaken to honour the plaintiffs' draft, therefore they are bound to pay it." The same doctrine was admitted in *Mason v. Hunt*, Dougl. 297; but that was a conditional acceptance, and the condition was afterwards broken. In *Powell v. Monnier*, 1 Atk. 611, there was an assurance by letter that the bill should be accepted, which was holden sufficient to bind the drawee; but that was after the bill was drawn. 2dly, Supposing this not to amount in law to an acceptance, yet there is sufficient consideration to sustain a verdict for the plaintiffs on the money counts. The defendant owed *Ruff* this money; and his promise to honour the bill when drawn was an agreement to take as his creditor any person to whom *Ruff* should appoint the money to be paid. He then having by his indorsement appointed the money to be paid to the plaintiffs, it raises an assumpsit in law by the defendant to pay them so much. And the authority having been given by *Ruff* before his bankruptcy that event cannot vary the case. It was holden in *Fenner v. Nears*(a) that general *indebitatus assumpsit* would lie by the assignee of a respondentia bond against the obligor, who had before engaged by an indorsement on the bond to pay the same to any assignee: though it was agreed that no action could have been maintained on the bond itself by the assignee in his own name. It was there also admitted that if the obligor had paid the assignee, the former might have pleaded payment to an action on the bond brought by the obligee. And it

(a) 2 Blac. Rep. 1269. Vide also *James v. Dunlop*, 8 Term Rep. 595, where the assignment of a Scotch bond was deemed a good consideration to support an assumpsit here.

was there considered that the agreement amounted to a particular promise to the assignee whenever any such should be. Lord C. J. *De Grey*, said, that the contract was devised to operate upon subsequent assignments, and amounted to a declaration that upon such assignment the money borrowed should no longer be the money of *A.* but of *B.* his substitute. So here the agreement to accept amounts to a particular promise to the holder of the bill to whom it is negotiated to pay him the amount: it is money had and received to his use. Thus in *Tallock v. Harris*, 3 Term Rep. 174, a bill was accepted by the defendant payable to the order of a fictitious person whose supposed indorsement was put upon it; so that being incapable of proof, no action could be maintained as upon the bill. But the Court held that a bona fide indorsee for a valuable consideration might recover against the acceptor upon an implied assumpsit for money paid and money had and received. Lord *Kenyon* in giving judgment said, "it was an appropriation of so much money to be paid to the person who should become the holder of the bill." Again, in *Israel v. Douglas*, 1 H. Blac. 239, *A.* being indebted to *B.* for brokerage, and *B.* to *C.* for money lent, *B.* gave an order to *A.* to pay *C.* the money due from *A.* to *B.*, which order *A.* having accepted, a majority of the Court held that *C.* might maintain an action against *A.* for money had and received. And *Gould, J.* expressly likened it to the case of a man having money due to another in his hands, which that other orders him to pay to a third person: and that there was no substantial difference, whether one in fact pays money to another for a third person, or whether he gives the other an order to pay over so much money, to which he assents: that in reason and sound law it was money had and received to the use of such third person. *Wilson, J.* who differed on that point, yet agreed that the action was maintainable on the count for the insimul computassent. There is this further reason for holding the defendant liable, because his conduct was calculated to deceive third persons and put them off their guard: for if there had been no such promise to pay, the plaintiffs would have resorted to *Ruff* at once, and not have deferred their application till after the bankruptcy when it was too late. Besides, there was a subsequent promise by the defendant to pay the bill to the plaintiffs if they would indemnify him against *Ruff's* assignee; and as the law will indemnify him that is the same thing.

Lord *KENYON, C. J.* This is a question of great moment. It is much to be lamented that any thing has been deemed to be an acceptance of a bill of exchange besides an express acceptance in writing: but I admit that the cases have gone beyond that line, and have determined that there may be a parol acceptance: that perhaps was going too far; but at any rate, the determinations have gone no further; and I am not disposed to carry them to the length now contended for, and to say that a promise to accept a bill before it is drawn is equally binding as if made afterwards. It is not generally true, that a promise to do a thing is the same thing in law as the actually doing it; it certainly is not so as applied to this case. This was a promise to accept a non-existing bill, which varies this case from all those which have been decided upon the same subject; and I know not by what law I can say that such a promise is binding as an acceptance. The consequence is, that the plaintiffs cannot recover upon the count as upon an acceptance of a bill of exchange. As to the other ground, if we were to suffer the plaintiffs to recover on the general counts, we must say that a chose in action is assignable^(a), a doctrine to which I will never subscribe. I cannot, as at present advised, and upon the general view of it, agree with the case of *Fenner v. Mears* in Blac. Rep. The result of it, however, seems to be this, that the determination having been made according to equity and good conscience, the Court would not disturb the verdict; and I doubt whether the decision can be sustained on any other

(a) Vide *Forth v. Stanton*, 1 Saund. Rep. 210, 211, and n. 2. by Serjt. *Williams*.
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ground. The undertaking there indeed was in writing ; but I am not prepared to say that that makes any difference : though a distinction of that kind was much dwelt upon in another case as supplying a want of consideration(a) : but that has never been adopted since, and was afterwards expressly over-ruled in the case of *Rann v. Hughes* in the House of Lords(b). However, no question of that sort can arise here ; and I am clearly satisfied that there is no evidence to support the promises laid in any of the counts.

GROSE, J. It would be of most dangerous consequence to relax the rule of law to the extent here contended for. By the general rule a chose in action is not assignable, except by the custom of merchants. The assignment of a chose in action by a bill of exchange is founded on that law, and cannot be carried further than that will warrant it ; and no authority has been cited to shew that by the law merchant a mere promise to accept a bill to be drawn in future amounts to an actual acceptance of the bill when drawn. Then we have no authority to extend the rules which have been hitherto established. As to the general counts, if we were to permit the plaintiffs to recover on this evidence, it would be making all choses in action assignable, which cannot be contended for, and would throw the whole system into confusion.

LE BLANC, J. In the case of *Pierson v. Dunlop*, Cowp. 573, Lord Mansfield limited, and truly limited, the doctrine which had been before laid down in *Pillans v. Van Mierop*. He there says " It has been truly said as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, *He will duly honour it*, is no acceptance ; unless accompanied with circumstances which may induce a third person to take the bill by indorsement : but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer." Therefore, he explains and limits his own rule which he had before delivered concerning such an acceptance, confining it to the case where credit is given by a third person upon the faith of such an assurance, on which he acts, and by which he is induced to take the bill.

Lord KENYON, C. J. added, that he thought that the admitting a promise to accept before the existence of the bill to operate as an actual acceptance of it afterwards, even with the qualification last mentioned, was carrying the doctrine of implied acceptances to the utmost verge of the law ; and he doubted whether it did not even go beyond the proper boundary : though this case was not helped even by that opinion.

Rule discharged(c)(1).

(a) Vide the opinion of *Wilmot, J.* delivered in *Pillans v. Van Mierop*, 3 Burr. 1670, 1.

(b) 7 Term Rep. 350. n. [S. C. 4 Bro. Parl. Ca. 27. Toml. edit.]

(c) In *Beaves' Lex Merc.* 454. pl. 16. it is said, " If the possessor (i. e. of a bill of exchange) hath neglected to demand acceptance before the drawer's failure, and the person to whom it is directed has advice thereof, he cannot be compelled to accept the draught, though previous to the knowledge of the drawer's misfortunes he had acquainted him with his intention to honour his bill, and even afterwards confesses that he should have done it, had it been presented and the acceptance demanded before the advice of the drawer's failure had reached him." And again, p. 466, pl. 112. " He that verbally or by letter has promised to accept any bills drawn on him for a third person's account, and he to whom the promise was made does in consequence thereof give the third person credit, relying on a punctual compliance ; in this case, he that has engaged his word is obliged to fulfil it, or be answerable for all damages that shall proceed from a breach thereof, &c.

(1) Vide *Clarke v. Cooke*, 4 East, 57. *Wynne & al. v. Raikes & al.* 5 East, 514. *McEvers v. Mason & al.* 10 Johns. Rep. 207. *Wilson v. Clements*, 3 Mass. Rep. 9. & seq. *McKim v. Smith & Steens*, 1 Hall's Amer. Law Journ. 486. *Havens v. Griffin*, Chip. 42.

M'Manus v. Crickett.

1 East, 106. Nov. 26, 1800.

A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master. But he is liable to answer for any damage arising to another from the negligence or unskilfulness of his servant acting in his employ.

THIS case was very much discussed at the bar, upon a motion to set aside a verdict for the plaintiff and enter a nonsuit, by *Gibbs* and *Wood*, against the rule, and *Garrow* and *Giles* in support of it. The Court took time to consider of their judgment; and afterwards entered so fully into the cases cited and the arguments urged at the bar, that it is unnecessary to detail them in the usual form.

Lord KENYON, C. J. now delivered the unanimous opinion of the Court^(a).

This is an action of trespass, in which the declaration charges that the defendant with force and arms drove a certain chariot against a chaise in which the plaintiff was riding in the king's highway, by which the plaintiff was thrown from his chaise and greatly hurt. At the trial, it appeared in evidence that one *Brown*, a servant of the defendant, wilfully drove the chariot against the plaintiff's chaise, but that the defendant was not himself present^(b), nor did he in any manner direct or assent to the act of the servant, and the question is, if for this wilful and designed act of the servant an action of trespass lies against the defendant his master? As this is a question of very general extent, and as cases were cited at the bar, where verdicts had been obtained against masters for the misconduct of their servants under similar circumstances, we were desirous of looking into the authorities on the subject before we gave our opinion; and after an examination of all that we could find as to this point, we think that this action cannot be maintained. It is a question of very general concern, and has been often canvassed; but I hope at last it will be at rest. It is said in Bro. Abr. tit. Trespass, pl. 435. "If my servant, contrary to my will, chase my beasts into the soil of another, I shall not be punished." And in 2 Roll. Abr. 553. "If my servant, without my notice, put my beasts into another's land, my servant is the trespasser, and not I; because by the voluntary putting of the beasts there without my assent, he gains a special property for the time, and so to this purpose they are his beasts." I have looked into the correspondent part in Vin. Abr. and as he has not produced any case contrary to this, I am satisfied with the authority of it. And in Noy's Maxims, ch. 44. "If I command my servant to distrain, and he ride on the distress, he shall be punished, not I." And it is laid down by Holt, C. J. in *Middleton v. Fowler*, Salk. 282, as a general position, "that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him." Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt his master will not be answerable for such act. Such upon the evidence was the present case: and the technical reason in 2 Roll. Abr. with respect to the sheep applies here; and it may be said, that the servant by wilfully driving the chariot against the plaintiff's chaise without his master's assent gained a special property for the time, and so to that purpose the char-

(a) *Lawrence*, J. was present in Court when the case was argued on a former day in the term.

(b) No person was in the carriage: the act was done by the servant, either in going for, or after he had set down his master.

iot was the servant's. This doctrine does not at all militate with the cases in which a master has been holden liable for the mischief arising from the negligence or unskilfulness of his servant who had no purpose but the execution of his master's orders; but the form of those actions proves that this action of trespass cannot be maintained: for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of those actions shews, that where the servant is in point of law a trespasser, the master is not chargeable as such; though liable to make a compensation for the damage consequential from his employing of an unskilful or negligent servant. The act of the master is the employment of the servant; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant. If this were otherwise the plaintiffs in the cases mentioned in 1 Lord Raym. 739, (one where the servants of a carman through negligence ran over a boy in the streets and maimed him: and the other, where the servants of A. with his cart ran against the cart of B. and overturned it, by which a pipe of wine was spilled;) must have been nonsuited from their mistaking the proper form of action, in bringing an action upon the case, instead of an action of trespass; for there is no doubt of the servants in those cases being liable as trespassers, even though they intended no mischief; for which, if it were necessary, *Weaver v. Ward* in Hobart 134, and *Dickinson v. Watson* in Sir Thomas Jones 205, are authorities. But it must not be inferred from this, that in all cases where an action is brought against the servant for improperly conducting his master's carriage, by which mischief happens to another, the action must be trespass. *Michael v. Allestree* in 2 Levinz. 172, where an action on the case was brought against a man and his servant for breaking a pair of horses in *Lincoln's Inn Fields*, where being unmanageable they ran away with the carriage and hurt the plaintiff's wife, is an instance to shew that trespass on the case may be the proper form of action. And upon a distinction between those cases where the mischief immediately proceeds from something in which the defendant is himself active, and where it may arise from the neglect or other misconduct of the party, but not immediately, and which perhaps may amount only to a non-fezance, we held in *Ogle v. Barnes*, 8 Term Rep. 188, that the plaintiff was entitled to recover. The case of *Savignac and Roome*, 6 Term Rep. 125, which was much pressed as supporting this action, came before the Court on a motion in arrest of judgment; and the only question decided by the Court was, that the plaintiff could not have judgment, as it appeared that he had brought an action on the case for that which in law was a trespass; for the declaration there stated, that *the defendant* by his servant *wilfully* drove his coach against the plaintiff's chaise. *Day v. Edwards*, 5 Term Rep. 648, was also mentioned; which was an action on the case, in which the declaration charged the defendant personally with furiously and negligently driving his cart, that by and through the furious, negligent and improper conduct of the defendant the said cart was driven and struck against the plaintiff's carriage: and on demurrer the court were of opinion, that the fact complained of was a trespass. And in the last case that was mentioned of *Brucker v. Froment*, 6 Term Rep. 659, the only point agitated was, Whether evidence of the defendant's servant having negligently managed a cart supported the declaration, which imputed that negligence to the defendant: and the Court with reluctance held that it did, on the authority of a precedent in Lord Raymond's Reports 264. of *Turberville and Stamp*. In none of these cases was the point now in question decided; and those determinations do not contradict the opinion we now entertain, which is, that the plaintiff cannot recover, and that a nonsuit must be entered.

Per Curiam,

Rule absolute for entering a nonsuit(a)(1).

(a) See *Morley v. Gaisford*, 2 H. Blac. 442, where it was holden that case and not tres-

Bird v. Appleton.

1 East, 111. Nov. 27, 1800.

After a *venire de novo* awarded upon an imperfect special verdict, and a new trial granted after a verdict for the plaintiff on the second trial, and the jury find again for the plaintiff on the third trial, he is only entitled to the costs of the last trial, unless it be otherwise expressed in the rule granting the new trial.

THIS came on upon a motion for the master to review his taxation in an action upon two policies of insurance, one being upon the ship, and the other upon the cargo. On the first trial the jury having found an imperfect special verdict(a), this Court directed a *venire de novo*; and upon the second trial, the jury having found entire damages upon the whole declaration, instead of giving distinct damages on each count, a new trial was directed(b); and the jury having found again for the plaintiff, the Court gave judgment for him on the first count of his declaration. And the question now for the Court to decide was, whether the plaintiff were entitled to the costs of any other than the last trial. The matter was argued at some length at the bar by *Perceval* in support of the rule, the effect of which was to confine the costs to be taxed on the last trial only; and by *Erskine* and *Law*, contra. The Court, to make an end of any doubt in future upon the practice, took time to consider of their judgment. And now

LORD KENYON, C. J. delivered their unanimous(c) opinion. After stating the facts as above mentioned, and the question for their determination, his Lordship proceeded as follows. This is a question which depends not on any abstract reasoning, but must be governed altogether by the settled practice of the Court. The Rule of this Court as laid down in the cases of *Mason v. Skurry*, Dougl. 437, and in *Shoolbred v. Nutt*, Michaelmas, 23 Geo. 3. referred to in a note in Dougl. *Hankey v. Smith*, 3 Term Rep. 507, and *Smith v. Hall*, 6 Term Rep. 71, in which the case of *Davilla v. Herring* in 1 Strange 300, now relied on for the plaintiff, was cited and considered by the Court, is, that the costs of the first trial shall not be allowed, though the verdict has gone the same way, unless so expressed in the rule granting the new trial; and if the rule be silent in that respect, the costs of the first trial are never allowed, whichever way the verdict may go upon the second trial. In the court of Common Pleas the rule is different(d); there if a new trial be granted, and the rule say nothing about costs, if the verdict, on the second trial go the same way, the party succeeding has the costs of both trials; but if the verdicts go different ways, the party ultimately succeeding has not the costs of

pass was the proper remedy for an injury done to the plaintiff's chaise by the servant of the defendant so negligently driving his carriage that it struck against the plaintiff's chaise and broke it. The Court said, "it was difficult to put a case where the master could be considered as a trespasser for an act of his servant which was not done at his command."

(1) [The case in the text is a leading one upon the point decided,—and the opinion of Lord Kenyon is considered to be admirable for its accuracy and comprehensiveness. The judgment is inserted at length by Judge Story in a note at page 474 of his *Treatise on Agency*, with a proper eulogy of its merit. Reference is also given to *Smith on Mercantile Law*, p. 69, 70. *Croft v. Alison*, 4 B. & A. 590.—W.]

(a) The *venire de novo* was awarded because the jury had found the evidence only of a fact instead of the fact itself on which the defence was founded.

(b) The second count on the policy on the ship was finally abandoned by the plaintiff's counsel on this ground, that, as the policy on the ship attached, "at and from Canton," including a period of time when an illegal cargo before taken in at Bombay, in contravention of the laws of this country, was still on board, and as the immediate voyage and adventure insured could not be divided into parts, the whole must be deemed an illegal adventure. Vide *Bird v. Appleton*, 8 Term Rep. 564.

(c) LAWRENCE, J. was present in Court when the case was argued.

(d) Vide *Trelawney v. Thomas*, 1 H. Blac. 641.

the first trial. Though the practice of the two courts differ in these respects, they both lead to the same end; and the discretion of the one court, as to the terms upon which a new trial shall be granted, is not more fettered than that of the other. On granting a new trial both courts can give such directions as they think just respecting the trial, which has been had: the parties themselves may apply to have the general rule varied upon granting the new trial, if they shall be so advised: but if nothing be then said about the costs it must be intended that in the judgment of the Court its general rule suited the justice of the case, and that the parties themselves did not feel they had any ground to vary it. The practice being thus settled, wherever there has been a second trial, by a series of uniform cases, subsequent to the case of *Davilla* and *Herring* up to the present time, there is no ground for the master allowing the plaintiff his costs of the first trial of this action after the granting the *venire de novo*. And as to the case of *Booth v. Atherton*, 6 Term Rep. 144, which was cited for the plaintiff, that was considered by the Court as distinguishable from the cases which guide us in our present opinion; and it never was by that intended to impeach the rule which had been established as to costs, where there was a second trial. With respect to the costs of the trial which was had on the original *venire*, we think that according to the cases of *Astle* and *Grant* and *Lickbarrow v. Mason*, the plaintiff is not entitled to the costs of that trial. In *Astle* and *Grant*, 6 Term Rep. 131, the then master Mr. *Benton* allowed the defendant the costs only of the second trial; and in *Lickbarrow* and *Mason*, which is in the 6 Term Rep. 131, Mr. *Wood* upon the authority of the case of *Burchall v. Ballamy*, in 5 Burr. 2694, which upon this occasion has been relied on for the plaintiff, applied to the Court to direct the master to review his taxation, and to allow the costs of the first trial; but the Court refused to grant the rule *nisi*; being of opinion, that where a *venire de novo* is awarded, the party ultimately succeeding is only entitled to the costs of the last trial. For these reasons we are of opinion that the plaintiff is not entitled to the costs of the two first trials. And therefore this rule for the master to review his taxation of costs in the cause now before the Court must be made absolute.

Per Curiam,

Rule absolute(a).

The King v. The Mayor and Burgessés of Newcastle upon Tyne.

1 East, 114. Nov. 27, 1800.

Though by the stat 9 Ann. c. 20. s. 2. the prosecutor of a *Mandamus*, to which there is a return, and issue taken on the facts therein, had an option to try the question in the same county in which he might have brought an action for a false return; yet if all the material facts are alleged in one county and issue taken thereon there, he cannot issue the *venire facias* into another county, though he might originally have alleged the facts there, and have there brought his action for a false return.

A *MANDAMUS* issued to the defendants directing them to admit one *W. Batson* to his freedom by reason of his service as an apprentice to a freeman of the borough. The *Mandamus* in the recital part alleged, that every person bound apprentice to and serving for seven years one of a certain fraternity re-

(a) So when upon setting aside a nonsuit the costs are directed to abide the event, though the plaintiff succeed on the second trial he is not entitled to the costs of the first; neither is the defendant in such case entitled to the costs of the first trial. *Austen v. Gibbs*, 8 Term Rep. 619. In that case, the master considered that where the costs were directed to abide the event, the costs of the first trial only followed the costs of the second, if the same party succeeded on both.

siding within the town was entitled to be admitted to his freedom and sworn in; and it then averred, that *W. B.* came within all the requisite facts constituting the custom, and amongst others that he did serve one *R. R.* one of the fraternity as an apprentice for seven years; all which facts were alleged to have happened within the town of *Newcastle*. The defendants in their return to the writ, admitting the custom, alleged that *W. B.* did not as an apprentice serve the said *R. R.* on which issue was joined in the county of the town of *Newcastle*. The prosecutor, notwithstanding, issued the *venire facias* to the sheriff of *Middlesex*, intending to try the cause at the sittings at *Westminster*. Whereupon a rule was obtained calling on the prosecutor to shew cause why the writ of *venire facias* issued in this prosecution should not be quashed, and a *venire facias* awarded to the sheriff of the town of *Newcastle*, or to the sheriff of the adjoining county of *Northumberland*. Against which,

Wood now shewed cause. By the stat. 9 Ann. c. 20. s. 2, after issue taken on any material fact in a return to a writ of *Mandamus* "such further proceedings, and in such manner, shall be had therein for the determination thereof, as might have been had if the person suing such writ had brought his action on the case for a false return: and if any issue shall be joined on such proceedings, the person suing such writ shall and may try the same in such place, as an issue joined on such action on the case should or might have been tried," &c. By this statute, therefore, though the proceedings properly originated in *Newcastle*, yet the prosecutor may try the issue in *Middlesex* in like manner as he might have brought his action here for a false return (a). He also suggested as a reason for issuing the *venire* into *Middlesex*, that the corporation of *Newcastle* were interested in the question (b).

Law and Littledale, contra. The cause of action here arises altogether in *Newcastle*, and therefore the venue is properly laid there, and could not properly be laid elsewhere. But admitting that by the words of the statute of Ann the prosecutor had an option to try the question in *Middlesex*, yet he has precluded himself by the manner of laying the facts and taking the issue, which is all in the county of the town of *Newcastle*. And there is no instance without a special suggestion entered on the roll of awarding a *venire* into a county where the issue is not taken. And they referred to the cases collected in 21 Vin. Abr. tit. *Trial*, p. 98, &c.

Lord KENYON, C. J. said, that nothing was more common than for actions for false returns to writs of *Mandamus* to be tried in *Middlesex*: He remembered instances of this from *Carlisle* and *Shrewsbury*. And by the stat. of Ann, the prosecutor had an option to have tried the question here in the same manner as in an action for a false return: but he had precluded himself by the manner in which the issue was taken; for all the facts were alleged to have happened in *Newcastle*, and the issue was taken there.

Per Curiam,

Rule absolute.

(a) Vide *Rez v. The Mayor of Oxford*, Salk 669. and *Russell v. Suecler*, 1 Sid. 218. The venue may either be laid in the county where the subject matter of the false return arises, or in *Middlesex* where the return is filed. So *Cameron v. Gray*, 6 Term Rep. 363. in the case of an action for infringing a patent.

(b) Vide stat. 38 Geo. 3. c. 52. s. 1. which empowers the Court to award the *venire* into another county on application for this purpose.

The King v. Kynaston.

1 East, 117. Nov. 27, 1800.

The stat. 35 G. 3. c. 101. s. 2. after enabling justices to suspend orders of removal of poor persons, and to order the charges thereby incurred to be defrayed by the pauper's parish, and to direct the charges to be levied by warrant of distress, enacts that if the parties against whom it is issued are out of the jurisdiction of the justice granting the warrant, it shall be indorsed by some other justice within whose jurisdiction they are; This is peremptory on the latter upon request made.

GARROW, on a former day, obtained a rule to shew cause why a *Mandamus* should not issue to Mr. *Kynaston*, a magistrate of the county of *Essex*, commanding him to back the warrant of distress issued by the magistrates for the borough of *Colchester* for 20*l.* 16*s.* 3*d.*, being the expences incurred by the parish of *Lexden* in the maintenance and support of *D. Glover* and *Ann* his family, and for surgical assistance, &c. for the said *D. G.* in his illness, during the suspension of an order for removing him to his parish, and 30*s.* for the reasonable charges of the levy. It appeared that *Glover*, on the 1st of *May* 1799, as he was driving a waggon on the public road leading through *Lexden*, had the misfortune to break both his legs, and was immediately taken to the workhouse there, where he continued till the 31st of *July*. On the 6th of *May*, two justices of the peace took the pauper's examination, and made an order for removing him and his wife, who was then attending him, from *Lexden* to *Coggeshall* in *Essex*; and at the same time the magistrates indorsed an order of suspension on the order of removal, by virtue of the stat. 35 Geo. 3. c. 101., stating that it would be dangerous to remove him at that time; and he continued there accordingly till the 31st of *July*, when the order of removal was by their permission executed. The same magistrates afterwards made an order on the parish officers of *Great Coggeshall* to repay the parish of *Lexden* 20*l.* 16*s.* 3*d.* for expences incurred in the cure and maintenance of the pauper: and the overseers of *Great Coggeshall* not paying this within three days after demand, nor giving notice of appeal, as required by the same act, the magistrates granted a warrant of distress. But *Great Coggeshall* being without the jurisdiction of the magistrates granting the warrant, the parties applied to the defendant who was an acting magistrate within the jurisdiction of *Great Coggeshall*, to indorse the warrant of distress for execution, which he refused: Whereupon the present rule was obtained.

Bayley, Serjt. now shewed cause, and was proceeding to shew that the order of removal was in itself illegal, because the pauper had not come into the parish of *Great Coggeshall* to inhabit or settle there, but was detained there by an unavoidable accident; and therefore fell within the description of casual poor, who were not the objects of removal, nor intended to be made such by the act in question; and that this Court would not grant a *Mandamus* to enforce an illegal order. But

Lord **KENYON**, C. J. after looking into the act of the 35 Geo. 3. c. 101. said it was impossible to make any question upon this part of it: It is peremptory upon the magistrate under these circumstances to indorse the warrant; he has nothing to do with the propriety of making the original order or granting the original warrant: He acts merely ministerially; in like manner as justices do in allowing a poor rate, whose signatures are mere matter of form(a). The justices indeed, by whom the original order and warrant were issued, had a discretion to exercise upon the matter submitted to them; but the magistrate who merely indorses the warrant of another under this act is not answerable for the legality of it, which remains at the hazard of him who

(a) Vide *Rez v. The Justices of Dorchester*, 1 Stra. 393.

first granted it. Here also the order being for payment of above 20*l*. it might have been appealed against by the parties who were dissatisfied with it, and then the merits of the question might have been discussed. But the Court cannot do otherwise at present than make the

Rule absolute.

Henry Legard, Mirabella Shadwell, Widow, and Jane Legard, Robert Bramley, Richard Hargreave, and Ann his Wife, James Knight and Judith his Wife (late Judith Fletcher), Joseph Gomersall, and Elizabeth his wife (late Elizabeth Fletcher), Benjamin and Mary Simpson, and Patrick Reid and Elizabeth his Wife, Plaintiffs,

v.

John Haworth the elder and Dorothea his Wife, and John Haworth the younger and Sarah Haworth, Tarboton Bramley, William and Sarah Bramley, Henry Shadwell and Mirabella Shadwell the younger, Narcissus Huson, John Charnock, and John Smallpage, Defendants.

AND ALSO BETWEEN

The same Plaintiffs, with the Addition of L. Robinson who on the Death of James Knight had married his Widow Judith,

v.

William Aspinall Assignee of John Haworth the Elder, a Bankrupt, and Jonathan and E. W. Haworth, Infants by their next Friend, Defendants.

1 East, 120. Nov. 11, 1800.

A. devised a reversionary estate to *S. T.* and *A. S.* as tenants in common in fee; and in case "both or either of them should happen to die in the lifetime of *T. H.* (who had an estate for "life in the premises,) then the share or shares of her or them so dying to go "unto all and "every such child and children, grand-child and grand-children, of the said *S. T.* and *A. L.* "respectively, as should be living at the time of her or their decease, and to the issue of such "of them as should be then dead and have left issue, and to his, her, and their respec- "tive heirs, as tenants in common: yet, nevertheless, so as all the descendants of the said "S. T. should together be entitled only to one moiety of the said premises, and all the "descendants of the said *A. L.* should together be entitled to no more than the other "moiety thereof, and that none of such descendants, either of *S. T.* or *A. L.* should be "entitled to any greater or other share of the said respective moieties of the said respective "premises, than his, her, or their father or mother would have been entitled to, if living;" under this devise the grand-children of *S. T.* and *A. L.* though in case at the date of the will, can only take per stirpes, and not per capita, in substitution of such of their parents respectively as happened to be dead at the determination of *T. H.*'s life estate.

ON a bill exhibited in the court of Chancery to have the will of *William Brown* established, and the trusts of it carried into effect, and to have the rights of the several parties ascertained and declared, the following case was directed by the Lord Chancellor to be made for the opinion of this Court.

William Brown was at the time of making his will, and at his death, seised of the reversion in fee, expectant upon the death of *Thomas Hewitson*, of divers freehold estates in the county of *York*, and was also seised in fee in

possession of other estates, situate in other parts of *Great Britain*. The said *William Brown*, by his will duly executed, dated 8th of *March 1791*, devised the reversion in fee expectant upon the death of the said *Thomas Hewitson*, of and in the said premises settled upon him for life, unto his said devisee's niece *Sarah Tarboton* and his sister *Ann Legard*, their heirs and assigns respectively share and share alike, to take as tenants in common and not as joint tenants; subject to and charged with the payment of 1000*l.* as therein mentioned. And the deviser provided, that in case both his said niece *Tarboton* and sister *Legard*, or either of them, should happen to die in the life-time of the said *T. Hewitson*, then he devised the share or shares of her or them so dying of and in the said premises so settled upon *T. Hewitson* for life [subject to the payment thereof of the said 1000*l.* as thereinbefore mentioned] unto all and every such child and children, grand-child and grand-children, of his said niece *Tarboton* and sister *Legard* respectively, as should happen to be living at the time of her or their decease, and to the issue of such of them as should be then dead and have left issue, and to his her and their respective heirs and assigns forever, to take as tenants in common and not as joint tenants: yet nevertheless so as all the descendants of his said niece *Tarboton* should together be entitled only to one moiety of the said premises, and all the descendants of his said sister *Legard* should together be entitled to no more than the other moiety thereof; and that none of such descendants, either of his said niece *Tarboton*, or of his said sister *Legard*, should be entitled to any greater or other share of the said respective moieties of the said premises than his, her or their father or mother would have been entitled to if living. And the deviser devised unto *Dorothy* his wife for life all the rest, residue and remainder of his messuages, lands, tenements, hereditaments and real estate whatsoever and wheresoever, whether in possession, reversion, remainder or expectancy, and not therein before disposed of; and after her decease he devised the whole of his said real estate so settled upon his said wife for life unto his said niece *Sarah Tarboton* and sister *Ann Legard*, their heirs and assigns respectively, share and share alike, to take as tenants in common and not as joint tenants. And in case both his said niece *Tarboton* and sister *Legard*, or either of them, should die in the lifetime of his said wife, then he devised the share or shares of her and them so dying of and in the whole of his said real estate so settled upon his said wife for life unto all and every such child and children, grand-child and grand-children of his said niece *Tarboton* and sister *Legard* respectively as should happen to be living at the time of her or their decease, and to the issue of such of them as should be then dead and have left issue, and to his, her and their respective heirs and assigns forever, as tenants in common as aforesaid: Yet nevertheless so as all the descendants of his said niece *Tarboton* should together be entitled only to one moiety of the said last-mentioned premises: and all the descendants of his said sister *Legard* should together be entitled to no more than the other moiety thereof; and that none of such descendants should be entitled to any greater or other share of the said respective moieties thereof than his, her, or their father or mother would have been entitled unto if living.

At the date of the deviser's will, his niece *Sarah Tarboton* had three grand-children only, *viz. Tarboton Bramley* and *William Bramley* the children of her daughter *Martha Bramley*, and *John Haworth* the younger, the son of her daughter *Dorothea Haworth*; and at the same time the deviser's sister *Legard* had two grand-children only then living, *viz. Henry* and *Mirabella Shadwell* the younger. The testator died on 4th of *January 1792*. *Thomas Hewitson* died 16th of *November 1794*. The deviser's niece *Sarah Tarboton* died in his lifetime, and in the lifetime of *Thomas Hewitson*, leaving at her death two children, namely, *Martha Bramley* her daughter, who survived the testator and died the 13th of *February 1795*, and *Dorothea Haworth* her

daughter still living, and the three grand-children above named, two of them being the children of *Martha Bramley*, and one the child of *Dorothea Haworth*, all now living. *Ann Legard* the devisor's sister survived him, but died in the lifetime of *Thomas Hewitson* and *Dorothy Brown* the testator's widow. And the said *Ann Legard* left at her death three children and two grand-children; her children were *Henry*, *Mirabella* and *Jane Legard*, all now living; her grand-children were *Henry* and *Mirabella Shadwell* above named, the children of *Mirabella Shadwell* now living. *Dorothy Brown*, the devisor's widow, survived both the devisor, his niece *Sarah Tarboton*, and his sister *Ann Legard*; and died in September 1795. The question is, whether the grand-children of the devisor's niece *Sarah Tarboton* and of his sister *Ann Legard* took any and what estate by the will.

Holtroyd, for the plaintiffs, contended that the descendants of the devisor's niece *Sarah Tarboton* and of his sister *Ann Legard*, who were the principal objects of his bounty, take only *per stirpes* and not *per capita*, and consequently that the grand-children named in the will, whose parents are living, take nothing, but only the grand-children of the parent who is dead. As to the estate settled on *Thomas Hewitson* for life, *Martha Bramley* and *Dorothy Haworth* (the daughters of *Sarah Tarboton*) took one moiety of the reversion between them, and *Ann Legard* took the other moiety, which at her death devolved on her three children *Henry* and *Jane Legard* and *Mirabella Shadwell*. As to the reversionary estate after the death of the devisor's widow, as *Martha Bramley* was dead at that time, her share devolved on her two children *T. B.* and *W. B.* who with *Dorothy Haworth* took one moiety, and the children of *Ann Legard* took the other moiety. No other construction than this is consistent with the words of the will; for the descendants of the two principal devisees are to take in such a manner "so as all the descendants of his niece *Tarboton* should together be entitled only to one moiety, and all the descendants of his sister *Legard* should together be entitled to no more than the other moiety." And this is further confirmed by the words which follow, "and that none of such descendants should be entitled to any greater or other share of the said respective moieties than his or their father or mother would have been entitled to if living." Now if the parent were living, it is clear that the child could not take any share; because if he took any, it must necessarily be *other*, share than the parent would otherwise have taken, as it would be a divided share: That shews that in no case were the children to take but in substitution of the parent. But if a contrary construction were to prevail, that all the children and grand-children living at the time were to take *nominatim*, then as to the moiety of the reversion of the estate bequeathed for life to *T. Hewitson*, *Martha Bramley* and her two children would have taken a greater share than *Dorothy Haworth* and her one child, and *Martha Bramley's* children would ultimately take a greater share than their parent could have taken, and certainly a different share; and so of the rest. The case of *Routledge v. Dorril*, 2 Ves. jun. 357, 366, is an authority to shew that where an estate was directed in a marriage settlement to go in default of appointment to all and every the children and grand-children or issue living, &c. with a proviso that the issue of any children dead should not have a greater share than their parents would have had, the children of a living parent cannot take any share.

Wetherall, contra. The intent was, that the descendants of the two principal devisees, at least as far as grand-children, who were living at the decease of either of them, should take *per capita* in equal shares. Nothing can be more express to this purpose than the words of the first part of the devise. In case either *Sarah Tarboton* or *Ann Legard* should die in the lifetime of *Thomas Hewitson*, then the devisor directs "that the share of her or them so dying shall go unto all and every such child or children, grand-child or grand-children of *S. T.* and *A. L.* respectively as should happen to be living at the

time of her or their decease, and to the issue of such of them as should be then dead and have left issue, and to his her or their respective heirs." Here then not only the children and grand-children, but also the issue of such as should be dead, were to take equal shares as purchasers. The only doubt which can be made arises upon the subsequent words relied on, "that none of such descendants of S. T. and A. L. respectively should be entitled to any greater or other share than his or their parent would have been entitled to if living." But in order to render the meaning of this latter part consistent with what goes before, the word *descendants* must mean descendants *ultra* the grand-children, who together with children were before specifically named, and in this sense such descendants might take *per stirpes*. In aid of this construction, it is probable that the grand-children being *in esse* at the time were as much objects of the devisor's bounty as the children or their parents, all being specifically mentioned. It also agrees with the critical meaning of the words. It is also confirmed by decided cases, which have given a legal interpretation of such words. Arguments derived from supposed cases, in which by this construction an unequal distribution would be made, do not apply, because all the persons were *in esse* at the date of the will, and there is no absurdity in supposing that each was equally within the contemplation of the devisor. The state of the family at the time points out the fair construction of the will. [Lord Kenyon observed, that according to the construction contended for, if a grand-child had been born after the making of the will he would be excluded: but that that was contrary to the resolution in *Ellison v. Airey*(a).] There might be some doubt in that case, but at any rate that question does not arise here. It was expressly determined in *Wild's* case, 6 Co. 17, that where the devise was to R. W. and his wife, and after their decease to their children, there being two children living at the time, the children took as purchasers. And the distinction was expressly taken, "that if A. devise lands to B. and his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail; because the intent appears that the children or issue should take, and they cannot take as immediate devisees, not being *in esse*; nor by way of remainder, for that was not the intent, the gift being immediate. But if B. had issue, then the express intent may take effect, according to the rule of the common law, and they shall have a joint estate for life. The same doctrine was laid down by Lord Hale in *King v. Melling*, 1 Ventr. 231. Here then the children and grand-children being *in esse* at the time, they must be taken to have been so named as *descriptio personarum*, and not included in the general description of *descendants*. The intent of the devisor must be considered in connexion with the settled rules of law. *Blandford v. Blandford*, 1 Rol. R. 319. Now here the first part of the devise is clear, and according to the legal construction of the words the children and grand-children would take *per capita*. The latter part points to a different construction, that the estate should be transmitted *per stirpes*. The two intents cannot take effect co-extensively. Either then the word *descendants* in the latter part must be confined to descendants *ultra* grand-children, in which case both intents may be carried into execution as far as they are compatible; or, if one must supersede the other altogether, as it is doubtful which is to prevail, the construction must be according to the common law rules of conveyancing; and then the children and grand-children will take *per capita*. *Daniel v. Uply*, Latch. 136, and *Taylor v. Sayer*, Cro. Eliz. 743. As to *Routledge v. Dorril*, 2 Ves. 357, it was a question on the construction of a marriage settlement, in which case a court of equity take

(a) 1 Ves. 111. So *Garbland v. Mayot*, 2 Vern. 105. At any rate, where the devise is general to children or grand-children, none shall take but those who were *in esse* at the time of the testator's death. *Northey v. Sirange*, 1 Pr. Wms. 341. and many other cases collected there in last edition, p. 342.

a greater latitude in construing and modelling it in order to effectuate the intention of the parties for the benefit of the family than a court of law would do upon the words of a will; for there is no conscience in construing a will as there is in respect to marriage articles.

Holroyd in reply, *Routledge v. Dorril* was upon the construction of a power of appointment in a marriage settlement; and at the time of the testatrix's death, who executed the power by her will, the grand-children were living: but no stress was laid upon that. *Wild's* case only shews that children being *in esse* at the time of the devise were capable of taking under that general description, if such appeared to be the intent of the devisor. But here the intent appears to be that the grand-children should not take as co-devisees with the children. The devise is not to the grand-children and their issue, but to the issue of such as should be dead; and it is given to them "so as," &c. which shews that they were not to take but as representatives of their parents. The word *descendants* cannot mean *ultra* grand-children; for that would be to exclude children and grand-children, which is directly contrary to the plain import of the words used.

LORD KENYON, C. J. At present it appears to me that the case of *Routledge v. Dorril* was well decided, and that it is an authority in point for the construction of this devise. The principal words to be attended to are these: "Yet nevertheless so as all the descendants of his said niece *Tarboton* should together be entitled only to one moiety, &c. and all the descendants of his said sister *Legard* should together be entitled to no more than the other moiety; and that none of such descendants should be entitled to any greater or other share of the said respective moieties than his, her or their father or mother would have been entitled to if living." According to the fair interpretation of these words no case can be put where the parent and children were to take together. If the first devisees were alive, they were to take; if they were dead, their respective moieties were to go to their respective children; if these died, then those who represented them respectively should take *in loco parentum*. Very proper stress has been laid upon the words, "that none of such descendants should be entitled to any greater or other share than the parent, if living, would have been entitled to." That necessarily supposes that if the father or mother had been living they would have taken in exclusion of their children. The answer attempted to be given to the case of *Routledge v. Dorril* is not well founded: As a general proposition it is clear that the intention of the parties to an instrument must both in law and equity govern the construction of it so far as the rules of law will permit; and there cannot be a different rule of construction upon the same words in the different courts. It is true the courts of equity have sole cognizance of trusts: but if the question be sent here in the shape of a devise of a term of years, this Court must put the same construction as a court of equity would do upon the same words. We will however consider of our opinion, and certify it to the Lord Chancellor.

LAWRENCE, J. The word "descendants" cannot as contended for, be taken in exclusion of children and grand-children; for the testator speaks of all the descendants of his niece *Tarboton* and of his sister *Legard*, which must include children and grand-children; and then says, that "none of such descendants shall be entitled to any greater or other share" than the parent would have been entitled to if living.

Afterwards the following certificate was sent the Lord Chancellor:

This case has been argued by counsel; we have considered it, and are of opinion, that *Tarboton Bramley*, and *William Bramley*, the grand-children of the testator's niece *Sarah Tarboton*, being the children of her daughter *Martha Bramley* (which *Martha Bramley* died in the lifetime of the testator's widow *Dorothy Brown*, but survived *Thomas Hewitson*), took each one undivided eighth part as tenants in common in fee in the premises, whereof the

said testator was seised in fee in possession, and which he devised to his said wife *Dorothy Brown* for her life : and as to the premises whereof the said testator was seised in fee simple in reversion expectant upon the death of *Thomas Hewitson*, that the said two grand-children of the said *Sarah Tarboton* did not take any estate by the said testator's will.

We are also of opinion, that *John Haworth* the younger, another grand-child of the testator's niece *Sarah Tarboton*, being the son of her daughter *Dorothy Haworth*, who is still living (having survived both *Thomas Hewitson* and *Dorothy Brown*), did not take any estate in any of the premises under the said will of the said testator. And also, that *Henry Shadwell* and *Mirabella Shadwell*, the two grand-children of the testator's sister *Ann Legard*, being the children of her daughter *Mirabella Shadwell*, who is still living (having survived both the said *Thomas Hewitson* and the said *Dorothy Brown*), did not take any estate in any of the premises devised by the will of the said testator.

KENYON.
N. GROSE.
S. LAWRENCE.
S. LE BLANC.

26th January, 1801.

REGULA GENERALIS.

Trinity Term 40 Geo. III. (a)

Regulation concerning the time for delivering paper books in cases entered for argument.

IT IS ORDERED that, from and after this Term, the Paper Books in causes entered with the Clerk of the Papers of this Court for argument on *Tuesdays* shall be delivered to the Lord Chief Justice and the rest of the justices of this Court on the *Saturday* next preceding that day ; and that those entered for argument on *Fridays* be delivered as aforesaid on the *Tuesday* next preceding the same ; with such marginal notes as are directed by the rule made in *Hilary Term* in the 38th year of the reign of his present Majesty.

REGULA GENERALIS.

Michaelmas Term 41 Geo. III.

Service of rules, &c. after 10 o'clock at night shall not be valid.

IT IS ORDERED that, from and after the first day of next *Hilary term*, no rules, orders or notices in any cause or matter depending in this Court shall be served, or any proceedings or pleadings delivered or served, later than 10 of the clock at night ; and that any service or delivery thereof after that hour shall be null and void.

(a) This was omitted in the Report of the last Term.

CASES

IN

HILARY TERM,

IN THE FORTY-FIRST YEAR OF THE REIGN OF GEORGE III.

Coutanche v. Le Ruez.

1 East, 183. Jan. 24, 1801.

Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed.

THE defendant was arrested in *Trinity* vacation 1799, under a writ issued against him and several others, returnable in *Michaelmas* term; and special bail was then put in and justified for the defendant, and the plaintiff proceeded to outlaw the other parties named in the writ, which outlawry was not completed till the fourth return of last *Easter* term: after which the plaintiff delivered his declaration, entitled generally of that term, wherein was contained the usual averment, that the other parties were outlawed. The defendant pleaded, *inter alia*, *nul tiel record* of outlawry, on which issue was joined; and thereupon a day was given to the plaintiff in *Michaelmas* term last to bring in the record; on which day, in order to avoid being concluded by the production of the judgment of outlawry, which appeared to be of a day subsequent to the first day of term, to which the declaration, being entitled generally, referred: the plaintiff obtained a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to amend his declaration by entitling it as of a particular day in *Easter* term, (being the day on which it was in fact delivered, which was after the outlawry was complete), instead of *Easter* term generally: and the Court ordered the production of the record of outlawry to be postponed in the mean time.

Giles now shewed cause, insisting that the amendment proposed would make the proceedings still more irregular; for according to *Smith v. Muller*, 3 Term Rep. 624, the declaration ought to be entitled of the term when the writ is returnable, although not filed till a term subsequent: and therefore the amendment, if any, should be to entitle it of a time prior instead of subsequent, according to the practice of the Court, from which the plaintiff had deviated in the first instance. But at any rate, the application to amend came too late after the expence of all the pleading was incurred, at least except upon payment of all the costs.

Howell, in support of the rule, said, that the amendment prayed for was according to the truth of the fact; and cited *Symonds v. Parmenter and another*, 1 Wils. 78, as in point, to which

The Court agreed; and added, that as the day on which the declaration

was delivered now appeared to be material, which probably did not appear when it was first drawn and entitled, there could be no objection to amend the title of it according to the truth and justice of the case. Therefore, they made the

Rule absolute(a),

on payment of the costs of the amendment.

Myrtle v. Beaver.

1 East, 185. Jan. 27, 1801.

A Captain of a troop, during the time of his absence, and while another officer is in the actual command of it, and by whom the orders for subsistence are issued, and the subsistence money is received from Government, is not liable to pay for subsistence furnished to the men, though he was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders.

THIS was an action for goods sold and delivered, tried before Lord *Kenyon* at the last Summer Assizes at *Lewes*. The defendant was Major and Captain of a troop in the *Hants* regiment of Fencible Cavalry. The plaintiff was a butcher at *Brighton*, where the troop was quartered. The action was brought to recover the value of meat furnished for the use of the troop between the 25th of *January* and the 22d of *February*, 1800. Previous to the first mentioned period the defendant had the command of his own troop at *Brighton*, and had employed a serjeant in the troop, of the name of *Bedford*, to act as his clerk in providing for the subsistence of the troop, which it is the duty of the Captain to do; and under the defendant's orders *Bedford* had from time to time given orders for and superintended the delivery of the meat; and while the defendant remained with the troop he had himself regularly paid the plaintiff his bill monthly; and the account was admitted to be settled up to the 24th of *January*. At that period the defendant was detached with a small party to command at *Arundel*, about 20 miles off, the greatest part of the regiment remaining at *Brighton* under the command of the Colonel. On the defendant's departure the actual command of his troop devolved upon Mr. *Hunt* the First Lieutenant, though they were still subject to the defendant's military orders, and all military reports and returns of the troop were made first to him, and from him to head quarters. After the defendant's departure from *Brighton*, serjeant *Bedford* received his orders from Lieutenant *Hunt* for the subsistence of the men, and received money from him for such purposes, and was employed by him, as he had before been by the defendant when he was present, to give orders for and superintend the delivery of the meat, which he did in the same manner as before; but it did not appear that such change of his authority was made known to the plaintiff, who continued to supply the meat as before. On the 20th of *February*, and before the usual time for settling the plaintiff's bill, Lieutenant *Hunt*, who besides his command in the troop was also paymaster of the regiment, absconded, without settling any of his regimental accounts, and leaving this demand among others unsatisfied. It appeared to be the course of the service that a certain allowance is made by Government to the Captain of every troop for the subsistence of the men, upon which he derives an allowed profit to himself, and to which he was still entitled during his absence on the detached command at *Arundel*. This subsistence money is issued every month from

(a) *Dickinson v. Plaisted*, 7 Term Rep. 474, the court gave leave to amend a record by inserting a special memorandum of the day when the plaintiff's bill was filed, after a writ of error brought. Amendments of this nature are allowed or refused in the discretion of the Court, according as they are conducive or not to the ends of justice. *Rex v. The Mayor*, 6 C. of *Grampound*, 1b. 708—5.

the agent of the regiment to the paymaster in advance, by whom it is paid over to the captains of troops, who draw upon the paymaster for it at their pleasure. The agent of the regiment regulates the amount of the monthly issue to the paymaster by the muster-rolls, and the bills which have before been sent in, and these are signed by the captain of the troop while he is in the actual command; but during the period in question, in which the plaintiff's bill accrued, returns of this nature were signed by *Hunt* and sent into the pay-office: and this allowance was in the course of the service received by *Hunt*, but was not in fact paid over by him to the defendant during the period that he was in the actual command of the troop. The paymaster is recommended by the colonel of the regiment and approved by the king, to whom he gives a bond to perform the duties of his office, and account faithfully, and to repay the surplus, if any, in his hands. For some days, at the latter end of *January* and beginning of *February*, the Colonel was absent from the regiment, and during that time the principal command devolved upon the defendant, as Major and next in seniority, who came over to and resided at *Brighton*, but *Hunt* still continued to have the actual command of the defendant's troop. Lord *Kenyon* was of opinion at the trial, that the defendant was not answerable; he not having been in the command of the troop during the whole period within which the goods were supplied, but *Hunt* having then the actual command; and the goods having been ordered by *Bedford*, acting at that time under *Hunt's* authority, and *Hunt* having received the money from the agent for this purpose, and having given bond to account for it; and the returns having been made during the same period by him to the agent, by which the issues of money are regulated. But a verdict was taken for the plaintiff, with leave to the defendant to move to enter a nonsuit, if this Court should be of the same opinion with his lordship.

Shepherd, Serjt. accordingly obtained a rule *nisi* for this purpose last term; against which

Garrow, *Adam*, and *Marryat*, now shewed cause. The Captain of the troop is the person by whom the orders for providing subsistence for the men are regularly issued. *Bedford* was appointed by the defendant as his agent for this purpose in the first instance, and the same person continued to give the orders during his absence. The plaintiff had no reason for supposing that *Bedford* was acting under the command of another: there was no notification of any such change to him. The defendant was not so far removed at *Arundel* from his situation of responsibility as to have lost the command of his troop. Though absent at other quarters a few miles off, the troop was still virtually under his command; for all military reports and returns were made to him as Captain. But, what is of most importance, he was still entitled to receive the emoluments arising from his command, part of which accrues from these very payments. Subsistence money is paid in advance by Government: and therefore it was in the defendant's power to have obtained the money for the period in question from the paymaster; it appears that he was in command at *Brighton* after the time when it must have issued to the paymaster, and if he did not obtain it, it was his own laches.

LORD KENTON, C. J. It is an undisputed fact that the defendant was not in the actual command of his troop during any period of the time when this demand accrued; but the command had devolved upon another officer who was next in seniority. The defendant neither gave the orders for the provisions, nor had he any authority to do so. It is true that the serjeant acted at first by the defendant's orders; but he is not to be considered as the agent of a private individual; it was plain that he acted as agent for whatever officer happened to have the command of the troop. The defendant has never received any money from government for this purpose; but the money was received by *Hunt*, who was next in command as well as paymaster, and by whom

it ought to have been paid over. So that on the whole there appears to be no ground for fixing the defendant with a liability in this case.

Per Curiam,

Judgment of nonsuit to be entered(1).

Eitherton v. Popplewell.

1 East, 189. Jan. 27, 1801.

Trespass lies against a landlord, who on making a distress for rent turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress.

TRESPASS for breaking and entering the plaintiff's dwelling house, and continuing there for three months, and expelling the plaintiff therefrom, and taking and detaining his goods in the house for the same space of time. And a second count for the asportation alone. Plea, *Not guilty*. At the trial before *Thompson*, B. at the last assizes at *Wells*, it appeared that the plaintiff was tenant of the premises to the defendant under a holding originally from *Lady-day* 1790, at an annual rent of three guineas, which by an agreement in writing was reserved quarterly; but before the year 1798, the rent had been agreed to be raised to five guineas; under what terms did not appear. On the 10th of *March* 1800, (the plaintiff having before absconded, and no rent having been paid since the preceding *Lady-day*) the defendant, accompanied by the tithing-man, entered the plaintiff's house in which his wife still remained, and seized his goods under the following notice: "*John Eitherton*, take notice, that I have this day seized and distrained the goods and "chattels hereunder set down, which are to remain in a house situate in the "parish of *Street*, in the county of *Somerset*, which you rent of me, for the "sum of 6*l.* 6*s.*, being for the rent of the said house due from you to me on "the 25th day of *March*; and if you do not discharge the said rent and charges of distress, or replevy the said goods and chattels within five days from "the 25th of *March* ensuing the date hereof, the same will be appraised and "sold according to the act of parliament," &c. Dated the 10th *March* 1800, and signed by the defendant and the tythingman. Then followed an inventory of the goods, with a charge to the plaintiff at his peril to remove before the day of sale. The goods were not in fact removed from the premises, but the defendant afterwards turned the plaintiff's wife out of the house, and locked it up, and kept the key. On the 30th of *March*, the plaintiff having returned again, paid the defendant five guineas for a year's rent due the *Lady-day* preceding, and one guinea for a calf; and at the same time desired to have the key of his house again; to which the defendant answered, that he should come to his house, where he should be back in a quarter of an hour. The plaintiff accordingly went there, and having staid an hour and a half, and the defendant not returning, he went away. In a day or two afterwards, however, the plaintiff was proved to be in possession again, but at what time he went in did not exactly appear. It was also proved, that previous to the 10th of *March*, when the distress was made, the defendant had said, that the plaintiff owed him nothing but a year's rent and a guinea for a calf, and that he should seize for the whole; and being told that he would do wrong in seizing for the calf, he answered, that he should seize for the whole, as no one would take the plaintiff's part.

It was objected at the trial by the counsel for the defendant, that the increased rent of five guineas must be deemed to be payable quarterly, as the original rent was so reserved; and that therefore three quarters of a year's rent being due at the time of the distress, the distress was lawful: and that if the plaintiff had any cause of action for the excess, he should have brought

(1) Vide *Rice v. Chute*, post, 779.

an action on the case, and not an action of trespass. The learned Judge, however, would not nonsuit the plaintiff, and the jury gave a verdict for the plaintiff with two guineas damages; the defendant having liberty to move the Court to enter a nonsuit if they thought the present form of action wrong. Such a rule was accordingly obtained in the last term, against which

Bond was now to have shewn cause. But *the Court* asked the defendant's counsel what objection could be made to this form of action for the excess of which the defendant had been guilty in this transaction, in turning the plaintiff's wife out of possession, and keeping possession of the house even after the rent was paid.

Gibbs in support of the rule. By the stat. of *Marlbridge*, 52 H. 3. c. 4. distresses must be reasonable, and not excessive; but the only remedy for any excess in making them is by an action on the case founded on the statute, and not an action of trespass(a). Now here the entry was originally lawful for the purpose of distraining for the three quarters rent in arrear; and what followed was consequential to the first act; and however irregular, it is only the subject matter of an action on the case, and not of trespass. The continuing in possession, and turning the plaintiff's wife out of doors, were done with a view of better securing the distress, and in furtherance of that object only.

LORD KENYON, C. J. No answer can be given to the action of trespass for the excess of the defendant's conduct in the subsequent part of the transaction, in turning the plaintiff's wife out of possession, which she held for her husband. If the question had depended merely upon the extent for which the distress was declared to be taken at the time, it might have admitted of a different consideration; for certainly the party would not have been concluded by that declaration; for a person may distrain for one thing and justify for another(b). Here the parties are at issue upon the plea of not guilty; there is no new assignment, and so no question upon that ground can arise; and we cannot say that the defendant has not been guilty of a trespass upon this evidence.

GROSE, J. The defendant not only turned the plaintiff's family out of possession at the time, but continued in possession of the house even after the rent was paid.

Per Curiam,

Rule discharged(1).

(a) *Hutchins v. Chambers*, 1 Burr. 590. So in *Lynne v. Moody*, Fitzg. 85. and 2 Str. 851. where it was holden that trespass would not lie for an excessive distress, because the first entry was lawful; and, say the Court there, "Here is nothing subsequent to make it a trespass, as there is where the distress is abused."

(b) *Crowther v. Ramsbottom*, 7 Term Rep. 665.

(1) Vide *Winterbourne v. Morgan, & al.*, 11 East, 395.

The King v. Waddington.*Offences at Common Law.* 1 East, 143. Jan. 28, 1801.

1. Spreading rumours with intent to inhanee the price of hops in the hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c. with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to inhanee the price.
2. Spreading such rumours generally with intent to inhanee the price of hops.
3. Endeavouring to inhanee the price by persuading divers dealers, &c. not to take their hops to market, and to abstain from selling for a long time.
4. Ingrossing large quantities of hops, by buying from many particular persons by name, certain quantities, with intent to resell the same for an unreasonable profit, and thereby to inhanee the price.
5. Ad idem, stating the particular contracts.
6. Getting into his hands large quantities, by contracting with various persons for the purchaser, with intent to prevent the same being brought to market, and to re-sell at an unreasonable profit, and thereby greatly to inhanee the price.
7. Buying like quantities with like intent.
8. Buying like quantities with intent to re-sell at exorbitant profit, &c.
9. Unlawfully engrossing, by buying large quantities with like intent.

AN information was filed, by leave of the Court, against the defendant, containing several counts; the first of which charged, that he, on the 29th of *March*, 1800, at *Worcester*, &c. wickedly intending to inhanee the price of hops, did spread divers rumours and reports with respect to hops, by then and there openly and wickedly, in the presence and hearing of divers hop-planters and dealers in hops and others then being at *Worcester*, &c. declaring and publishing that the then present stock of hops was nearly exhausted, and that from that time there soon would be a scarcity of hops, and that before the hops then growing could be brought to market the then present stock of hops would be exhausted; with intent and design by such rumours and reports to induce divers persons unknown then present, being dealers in hops, and accustomed to sell hops, and having large quantities of hops for sale, not to carry or send to any market or fair any hops for sale, and to abstain from selling such hops for a long time, and thereby greatly to inhanee the price of hops: in contempt, &c. to the evil example, &c. and against the peace, &c. The second count stated more generally, that the defendant at the day and place aforesaid, wickedly intending and contriving to inhanee the price of hops, did openly publish and spread divers rumours and reports with respect to hops, to the effect following, (viz.) that the then present stock of hops was nearly exhausted, and that there would soon be a scarcity of hops, and that before the hops then growing could be brought to market, the then present stock of hops would be exhausted; with intent by such rumours and reports as aforesaid to inhanee the price of hops, in contempt, &c. The third count charged, that the defendant unlawfully endeavoured to inhanee the price of hops by persuading and attempting to persuade divers persons dealing in hops, and accustomed to sell hops, and having large quantities of hops for sale, not to go to any market or fair with any hops for sale, and to abstain from selling such hops for a long time, in contempt, &c. and against the peace, &c. The fourth count charged, that the defendant unlawfully engrossed and got into his hands by buying a certain large quantity of hops, viz. 100 pockets of hops of one *W. G.* (and so on of above 30 other persons, naming them) at certain large prices, viz. 15*l.* for each 100 cwt. with intent to resell the same for an unreasonable profit, and thereby to inhanee the price of hops. The fifth count charged, that the defendant got into his hands a certain large quantity, viz. 3700 pockets of hops by contracting with *W. G.* (and many other persons, naming them) to buy and take of them the same, by persuading and procuring them to sell

and deliver to him the said quantity of hops, at certain large prices, viz. 13*l*. for every hundred weight which should be delivered to him on the 3d of *May*, then next following, and 14*l*. for every hundred weight delivered to him on the 19th of the said *May*, and 15*l*. for every hundred weight delivered to him on the 31st of said *May*; with intent to re-sell the said hops for an unreasonable profit, and thereby greatly to inhanche the price of hops. The sixth count charged, that he got into his hands another large quantity of hops, by contracting for the purchase of a certain quantity from a variety of persons named, at certain large prices, with intent to prevent the same from being brought to market for sale, and to re-sell the same for an unreasonable profit, and thereby greatly to inhanche the price of hops. The seventh count charged, that the defendant bought, and caused to be bought, and got into his hands a certain quantity of hops, by buying of one *W. G.* a certain large quantity, viz. 500 cwt. (and so of above twenty other persons) with the like intent as in the last count. The eighth count was to the same effect as the last, alleging only the intent to be, to re-sell the hops for an exorbitant profit, and thereby greatly to inhanche the price. The ninth count charged generally, that the defendant unlawfully engrossed and got into his hands, by buying of divers persons unknown, divers large quantities, viz. 500 tons of hops, with the like intent as last mentioned. And all the counts laid the offence to be in contempt of our Lord the King and his laws, to the evil example of all others, &c. and against the King's peace, &c.

Upon this information the defendant was convicted before *Le Blanc, J.* at the last assizes at *Worcester*, after a very long trial, and was brought up in *Michaelmas* term last to receive the judgment of the Court. On that occasion it was intended by the defendant's counsel to move in arrest of judgment, of which they had given notice; but when the matter was about to be argued, the defendant, who was present in Court, desired to waive all objections in arrest of judgment; in consequence of which his counsel suggested, that the same arguments which might be urged in arrest of judgment would in another shape avail the defendant in mitigation of the sentence; and they were proceeding to model their address accordingly. But

The Court said, that although the defendant had thought proper to waive any objection in arrest of judgment, yet if upon a review of the whole case they were satisfied he had not been guilty of any offence, they should not give judgment against him. According to what had been said with great wisdom and justice by Lord *Mansfield*, in the case of the *King v. Gough*(a), on a question respecting the propriety of granting a new trial in a criminal case, where the motion had not been made within the regular time; that if the defendant could shew that he had not been guilty of any offence, it was never too late to take advantage of it; and that the Court would inflict no punishment if there had been no offence. They therefore expressed a desire to hear any arguments in whatever shape urged, which went to do away the offence altogether.

In consequence of this intimation, the arguments after mentioned at the bar, though not urged regularly in the form of a motion in arrest of judgment, yet in effect took the same course. And after *Le Blanc, J.* had reported to the Court the evidence given at the trial; which it is not necessary here to detail, especially as the material facts appear upon the face of the indictment, and the substance of the general proof is stated in the judgment which was afterwards pronounced against the defendant;

Law, Dauncey, Wigley and *Peake*, in the course of their address to the Court in mitigation of punishment, urged the following arguments. The facts charged against the defendant never constituted any offence, even previous to the stat. 12 Geo. 3. c. 71.: but if they did the offences stated in each count and

(a) Vide Dougl. 797, 8.

all others *ejusdem generis* were done away by that statute, which went to repeal not merely the particular acts of parliament therein enumerated, but the whole system of laws respecting forestalling, regrating, and ingrossing. The act of the 5 & 6 Ed. 6. c. 14, is supposed to describe what the common law was in these respects, and that describes, s. 3, an ingrosser to be one who "shall ingross or get into his hands by buying, contracting, or promise taking, (other than by demise, grant, or lease of land or tithe,) any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again." To constitute the offence, therefore, with which the defendant is charged in the fourth and subsequent counts, the ingrossing must be of some commodity which constitutes *victuals*. But hops have been expressly adjudged to be no victuals within the meaning of that act, upon a reference to the Judges in the 20 Jac. 1., as was said by *Rolle*, C. J. Styl. 190, and *Rex v. Maynard*, Cro. Car. 231. (Lord *Kenyon* observed, that that resolution was before the stat. 9 Ann. c. 12. s. 24, had prohibited common brewers under a penalty from using any other bitter than hops in brewing beer: since which time at least it was impossible to say that hops were not a victual.) The same thing is repeated, and the same authority is cited by Lord Chief Baron *Comyns*, in the 4th vol. of his Digest, 69, tit. *Justices of Peace—Ingrossing*; which work was compiled after the statute. And the same matter is to be found in all the abridgments since that period; and in 1 Hawk. P. C. c. 80. s. 17. It is not indeed inserted in 3 Inst. 195, in the chapter on this subject; but that work is defective in many respects. But however doubtful this case might have been before the repeal of the stat. 5 & 6 Ed. 6., and certainly there had always been much fluctuation of opinion as well upon the definition of the offences themselves therein described as upon the policy of the laws against them: at any rate, those doubts were intended to be removed, and the whole system of this branch of law altogether done away by the act of the 12 Geo. 3. c. 71. This is most apparent from the resolutions of the Committee of the House of Commons, to whom it was referred by the House to make a report upon these laws; in which committee are to be found the names of some of the most enlightened statesmen of the age: and by them it was resolved (a), "that the several laws relating to badgers, engrossers, forestallers, and regrators, by preventing the circulation of and free trade in corn and other provisions, have been the means of raising the price thereof in many parts of this kingdom. 2dly, That the House be moved for leave to bring in a bill to remedy the evils occasioned by the said laws." It was thereupon ordered by the House *nemine contradicente*, "that leave be given to bring in a bill for remedying the evils occasioned by the laws now in being relating to badgers, engrossers, forestallers, and regrators." The preamble of the stat. 12 Geo. 3. c. 71, which followed thereupon, also stating that the restraints laid by several statutes upon the dealing in corn, &c. and sundry other sorts of victuals by preventing a free trade in the said commodities, have a tendency to discourage the growth and enhance the price, a mode of reasoning which strikes at the whole system of these laws: then proceeds to repeal several leading statutes by name, amongst others that of the 5 & 6 Ed. 6. c. 14., which was supposed to be declaratory of the common law itself, and all acts made for the better enforcement of the same; being, as the legislature say, detrimental to the supply of the labouring and manufacturing poor of the kingdom. The legislature then did not consider the practices against which

(a) Com. Journ. vol. 33. p. 590. These resolutions were first reported on the 8th of April 1767, from the Committee who were appointed to consider of the laws relating to badgers, engrossers, forestallers, and regrators, and to report their opinion to the House; which of the same were fit to be continued, amended or repealed. They were again revived on the 13th of March 1772.

these laws were made as the evil, but that the laws themselves were so. They state that *the restraints* laid by these statutes were detrimental to free trade, and to the supply of the poor. It is clear, therefore, that by the repeal of the stat. 5 & 6 Ed. 6, they concluded that they were repealing not merely the letter but the spirit of the law: for otherwise it was nugatory to repeal a statute taken to be declaratory of the common law, if the same restraint were to prevail after the repeal of the law as before. And according to Hardr. 209, which cites various passages from *Plowden*, that which is taken to be within the intent of an act, which the Judges are sometimes to collect from the occasion and necessity of enacting it, is equivalent to what is within the express words. This was so considered in a case of *Williams q. t. v. Watkins* in 1797, before Lord Chief Justice *Eyre* in C. B., which was an action for penalties on the stat. 25 Ed. 3. st. 4. c. 3, (an act not mentioned by name at least in the repealing act of the 12 Geo. 3.) for forestalling cattle coming to *Smithfield* market. His Lordship, however, said it was his opinion, and had been so considered by many learned men, that all the laws relative to forestalling, &c. were repealed, as well those which were omitted as those specially included in the act of the 12 Geo. 3.: and that if the plaintiff's counsel thought otherwise, he would suffer a verdict to be taken for the plaintiff in order that the opinion of the court might be had upon the subject: but there was no resistance to his Lordship's opinion, and the plaintiff was nonsuited. (*Le Blanc*, J. said, he did not know under what particular circumstances that case passed; but to his own knowledge there were several other *qui tam* actions upon statutes of this description which were not included in the repealing act of the 12 Geo. 3., upon which recoveries were had upon trials before the same learned Judge; which shewed that it was not his opinion that all the laws *in pari materia*, though not named in the repealing act, were by implication repealed. And therefore there was probably something else in the case alluded to than what the note purported.)

The defendant's counsel then took objections to the particular form of the counts. As to the first and second counts, charging the defendant with having spread rumours to inhanche the price of hops, the rumours are not stated to be *false*, which is essential to the offence. In 43 Ass. pl. 38, it is laid to be *in deceit of the people*. Bro. Indictment, pl. 40. Presentment, pl. 12. It is true that Lord *Coke* in the 3 Inst. 196, 6, describes the offence without that qualification: but the omission is supplied in express terms by Serjt. *Hawkins* in the 1 vol. P. C. c. 80, s. 1, who states the offence to be the endeavouring to inhanche the common price of any merchandize, and gives as an instance, the spreading of *false* rumours. At least, therefore, it should have been stated, that in fact the price of the commodity had been raised by means of such rumours. As to the third count, (which applies also to the two first,) it is not stated that the persons whom the defendant endeavoured to persuade not to bring their hops to market for sale, were persons bringing or about to bring their hops to market. In *Hook's* case, 1 Rol. Rep. 421, an indictment for forestalling was quashed for this defect; which by a parity of reasoning applies equally to this case. As to the fourth and subsequent counts for engrossing, it is not stated that the defendant bought the hops for the purpose of re-selling them in gross, without which there is no offence. The policy of the law in this respect was to prevent persons buying up large quantities in order to sell again in large quantities, which necessarily tends to inhanche the price of the commodity. And this agrees with what is said in 3 Inst. 196. 1 Hawk. P. C. c. 80, s. 3, and 4 Com. Dig. 68, but it never was nor can be deemed an offence to buy in gross for the purpose of selling again in retail, which for aught appears was the defendant's intention; although the price of the commodity must from the nature of the thing be thereby increased; for the individual consumer cannot be served in any other manner. It is true, that the last-mentioned author says, that an indictment for buying *ea inten-*

tionem ad revendendum is sufficient, and that after verdict it shall not be intended of a reselling by retail: but the authorities cited by him of Cro. Car. 315, and Jones, 320, do not warrant the position: for the objection was not that the defendant might, for aught appearing to the contrary, have sold again by retail, but that he might have sold again at reasonable prices, and so no ingrossing, which was the objection over-ruled. Besides, there is no quantity specified on the face of the information, out of which the defendant purchased the number of pockets of hops charged therein, which ought to have appeared. For engrossing is a relative term, and must mean getting either the whole of any commodity, or at least so much of it as to prevent others from supplying their wants in the common course of trade. Now here, in fact, the defendant did not purchase above a fifth part of the existing commodity at a single place, (*Worcester*) viz. 1000 out of 5000 pockets: whereas the quantity engrossed ought to be so much as will affect the consumption of the whole kingdom. (Lord Kenyon, C. J. That is a question of fact which the jury have decided against the defendant. *Le Blanc*, J. May not several persons be guilty of engrossing at the same time, though without any connexion with each other; whose dealings altogether may affect the general consumption? And yet the same answer might be given to each case.)

Erskine, Garrow, Gibbs, Milles, Manley, Scott, W. Jackson, and Harrison, for the prosecution. It is clear from the opinion of Lord Coke in 3 Inst. 195, and from all other general writers, that forestalling, engrossing, and regrating, were crimes at common law, and not created for the first time by the stat. 5 & 6 Ed. 6. c. 14; and indeed the statute itself speaks of them as offences known before. And therefore, when that and other statutes by name were repealed by the stat. 12 Geo. 3. c. 71, it left the common law untouched, and only took away the particular penalties superadded thereto. If the statute of Geo. 3. had been intended to take away the common law, it is more natural to suppose that it would have declared so in terms, or at least it would have been conceived in more general words of repeal. On the contrary, it is confined to the repeal of particular statutes enumerated, and omits several other statutes passed *in pari materia*, which it appears have been put *in ure* since the 12 Geo. 3. One of these is the stat. 15 Car. 2. c. 7. which prohibited the buying of corn to sell again, and the laying it up in granaries when it was above a certain price; which the legislature themselves have recognized as an existing statute since that period, having expressly repealed it by a late statute, the 31 Geo. 3. c. 30, s. 2. The reason why so little is to be found in the books concerning the common law upon this subject is, because from so early a period as the 5 & 6 Ed. 6. prosecutions for offences of this nature were framed with more facility and certainty upon the statute passed at that time. It is immaterial to consider whether hops be a *victual* or not, (although since the stat. 9 Anne, c. 12, s. 24, made it a necessary ingredient in beer, there can be no doubt that it must be now so considered, even if general use had not before made it so;) for the common law offences charged in the three first counts extend as well to practices to enhance the price of any other merchandise as of victuals. With respect to the quantity engrossed, it was not necessary to specify particularly the relative proportions. The offence itself consists in buying up indefinite large quantities of a commodity for the purpose of re-selling it at an unreasonable profit, and thereby to enhance the price at market. This may be done in a variety of ways: there may be an ingrossing, whether the quantity be more or less: that must depend upon circumstances of which the jury alone can judge, and they have found the fact against the defendant. But the offence is of a larger and more general description than the argument for the defendant assumes it to be; for any sort of practice, of which several are stated in the information, done with intent to raise the price of a commodity in a public market, is of itself a misdemeanor at common law, being an attempt highly immoral, and attended with

great public mischief. The spreading rumours whether true or false, if done with a mischievous intent to procure a public detriment, is indictable upon general principles of law ; in the same manner as publishing a libel, however true the facts stated may be. So in *Mr. Jolliff's case*(a), he was charged in a criminal information with endeavouring to procure an appointment of certain persons to be overseers ; an act indifferent in itself ; but the criminality lay in the intent, which was charged to be in order to derive a private advantage to himself from such appointment. And there it was not stated that the appointment was actually made. At any rate, if the truth of the rumours here were matter of justification, it lay upon the defendant to prove it in his defence, to whom it must be best known, and forms no part of the charge in the first instance.

Lord KENYON, C. J. then said, that the Court would take into consideration the particular objections which had been made to the information ; but for the present he would deliver the opinion which he had formed upon the general question ; which he did in substance as follows : Notwithstanding the turn which the arguments have taken, and though in form there is no motion in arrest of judgment regularly before the Court, yet it is very evident that the whole range of the law upon this subject has been ransacked, and every case bearing in any degree upon the subject has been brought forward. This is a most momentous question, and it well behoves us to be sure of every step we take: Whatever measures the legislature in their wisdom may think proper to adopt, in order as far as possible to alleviate the present pressure, and prevent its recurrence ; we in the mean time must act upon the law as it is ; such as we find it transmitted to us by the most reverend sages of the law. It has been said, that if practices such as those with which this defendant stands charged are to be deemed criminal and punishable, the metropolis would be starved, as it could not be supplied by any other means. I by no means subscribe to that position. I know not whether it be supplied from day to day, from week to week, or how otherwise ; but this is to me most evident, that in whatever manner the supply is made, if a number of rich persons are to buy up the whole, or a considerable part of the produce ; from whence such supply is derived, in order to make their own private and exorbitant advantage of it to the public detriment, it will be found to be an evil of the greatest magnitude ; and I am warranted in saying, that it is a most heinous offence against religion and morality, and against the established law of the country. That our law books do declare practices of the sort with which the defendant is charged to be offences at common law cannot be denied. But it has been argued that the stat. of Ed. 6.(b) against regrators, forestallers, and engrossers, having declared what the common law was, and it having been determined that *hops* were not a victual within that act, therefore the engrossing of hops was never an offence at common law, not being considered as a necessity of life. But it is not difficult to expose the fallacy of such reasoning as applied to the times in which we live. When fairly considered, no two cases can be more unlike. It was not long before that determination was made that hops were considered as a noxious weed, and consequently could not, under such circumstances, be considered as falling within the meaning of the law. But times went on, and things changed ; what was formerly considered as poisonous is now become a common necessary of life. This instance is not singular ; broom was formerly used as a bitter, which is now exploded. And it is but lately that the county of *Kent* was up in arms against the brewers for introducing quassia instead of hops into their beer, alleging its detrimental qualities to the health of the public, although we find it introduced into the *materia medica* as a salutary bitter, approved by the whole College

(a) See 4 Term Rep. 285, where this information is alluded to.

(b) 5 & 6 Ed. 6. c. 14.

of Physicians. So times and opinions alter. When hops were not a victual they were declared not to be within the scope of the law against monopolies; since they have become such, they fall under a different consideration. Then it is urged with great refinement, that, though in common use and necessary, they are not themselves a victual, but only a preservative of victual. But how does that objection agree with the determination respecting salt? The same thing might be said of this latter, and yet salt was holden to be a victual within the law against engrossing. Again, it is urged that the quantity purchased cannot constitute the offence of engrossing, unless it bear such a proportion to the consumption of the whole kingdom as will affect the general price. This objection is new to me: but if the opinions of Lord *Mansfield*, Mr. Justice *Dennison*, and Mr. Justice *Foster* are deserving of attention, there is as little in that objection as in the rest. I well remember an information moved for before them against certain persons for conspiring to monopolize or raise the price of all the salt at *Droitwich*. They had no doubt of its constituting an offence, although it was not pretended that these persons had endeavored to engross all or any considerable part of the salt in the kingdom. Nor was it questioned but that the monopolizing of salt was an offence at common law. If then, hops are become a necessary ingredient, though only for preserving the common drink of the people, they must be deemed a necessary of life and a victual, the engrossing of which, or committing any undue practices to enhance the price to the public, is an offence at common law. So far as the policy of this system of laws has been lately called in question, I have endeavoured to inform myself as much as lay in my power, and for this purpose I have read Dr. *Adam Smith's* work^(a), and various other publications upon the same subject, though with different views of it: amongst others, one addressed to Lord *Spencer*, which is written in a superior style to most of the others. I do not profess to be a competent judge in this conflict of political opinion; though I cannot help observing, that many of those who have written in support of our ancient system of jurisprudence, the growth of the wisdom of man for so many ages, are not, as they are alleged by some to be, men writing from their closets without any knowledge of the affairs of life, but persons mixing with the mass of society, and capable of receiving practical experience of the soundness of the maxims they inculcate. But without attending to disputed points, let us state fairly what this case really is, and then see if it be possible to doubt whether the defendant has been guilty of any offence. Here is a person going into the market who deals in a certain commodity. If he went there for the purpose of making his purchases in the fair course of dealing with a view of afterwards dispersing the commodity which he collected in proportion to the wants and convenience of the public, whatever profit accrues to him from the transaction, no blame is imputable to him. On the contrary, if the whole of his conduct shews plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity; to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price; who can deny that this is an offence of the greatest magnitude? It was the peculiar policy of this system of laws to provide for the wants of the poor labouring class of the country. If humanity alone cannot operate to this end, interest and policy must compel our attention to it. Now this defendant went into the market for the very purpose of tempting the dealers in hops to raise the price of the article, offering them higher terms than they themselves proposed and were contented to take, and urging them to withhold their hops from the market in order to compel the public to pay a higher price. What defence can be made for such conduct? and how is it possible to impute an innocent intention to him? We must

(a) *Wealth of Nations*.

judge of a man's motives from his overt acts; and by that rule it cannot be said that the defendant's conduct was fair and honest to the public. It is our duty to take care that persons in pursuing their own particular interests do not transgress those laws which were made for the benefit of the whole community. I am perfectly satisfied that the common law remains in force with respect to offences of this nature; and in considering whether that was intended to be done away by the act of the 12 Geo. 3., I cannot regard the resolutions entered on the Journals of the Commons House of Parliament, but must look to the statute-book; and there I find nothing which trenches upon what I have said, but only a repeal of certain statutes, upon none of which is this prosecution founded, but upon the common law. I have said thus much, which occurred to me, at present: but I shall consult with my brethren, and the case shall be fully considered upon all the objections which have been made before judgment is pronounced.

A question then arose, Whether the defendant should stand committed, the prosecutor's counsel saying they should not interfere, but let the usual course take place; and the defendant's counsel praying he might be bailed? But Lord *Kenyon* said, that unless the prosecutor consented to the defendant's remaining out on bail, it was a matter absolutely of course that he should be committed: the Court had no discretion to exercise, and the practice was too well settled to admit of argument.

On the last day of last term(a),

Lord *KENYON*, C. J. said, that though the defendant had waived making any motion in arrest of judgment, yet doubts having been thrown out concerning the nature of the offence imputed to him, it was essential to the ends of justice that the Court should take them into their serious consideration, as well with respect to the propriety of granting a new trial if the information were not sustained by the evidence, as whether any judgment ought to be given against the defendant on the information itself; and they were clearly satisfied that there was no ground either for a new trial or in arrest of judgment. That they should take time to consider till the next term what sentence was proper to be pronounced; but that the defendant should not suffer from the delay, as whatever imprisonment he suffered in the mean time would be taken into the account when sentence was passed. For the present he must stand committed till the 5th day of the next term.

Accordingly on this day the defendant being brought up to receive the judgment of the Court,

GROSE, J. in passing sentence delivered their opinion upon the particular case to this effect. The defendant has been found guilty upon an information charging him with having put in practice divers methods specified in the several counts, for the purpose of enhancing the price of hops. It appears from the evidence, that he being a merchant living in a distant county, (the county of *Kent*) in the months of *March* and *April* last went to the city of *Worcester*, where was held a considerable market for hops. That upon his arrival there the state of the market was, to use the expression of one of the witnesses and which is intelligible, *very slack*: that the stock of hops in that county was then very considerably more than sufficient to answer the current demand; and that there was then a prospect of their being lower. The price in the *January* preceding had been between 15*l.* and 16*l. per cwt.*, the market price in *March* was from 11*l.* to 13*l. per cwt.*; so low that the defendant thought fit to observe upon it, and state publicly in the market, which was very full, that the low price of hops was owing to a prosecution instituted against him. It appears that he then assured the by-standers, whether truly or not he best knew that the prosecution against him was dropped, and that

(a) *Lawrence, J.* was absent from indisposition at this time, as well as on the prior day in the term, when the case was argued at the bar.

of course hops must rise again. Nothing however of that sort was proved: and therefore the ground of the assertion, that hops would of course rise again, seems to have been not perfectly correct. He then further asserted that the stock of hops in the hands of the brewers was nearly exhausted; (an assertion for which there did not appear any foundation;) and further, that very soon they must come to him or to the hop-planters for hops; that hops would be at 20*l.* *per cwt.*; and that the hop-planters might depend on his assistance to keep them up. From thence it appears, that the defendant had a stock of hops in hand; and that it was his intention not only to keep up the price in his own dealings, but to assist others in doing the like, until that commodity which was then between 11*l.* and 13*l.* *per cwt.* should rise to 20*l.* *per cwt.* To effect this, he entered into contracts to purchase 200 pockets at 12*l.* 10*s.* *per cwt.* that day, and 200 pockets each succeeding market advancing each market till the price should arrive at 15*l.* *per cwt.*; and so become a purchaser of one fifth the produce of *Worcestershire* and *Herefordshire* at a much higher price than that at which hops were when he arrived at *Worcester*. In the present state of what is called paper credit, human ingenuity could not invent a more certain mode of enhancing the price of a commodity. And at the same time he urged the dealers in hops either not to bring them to market, or if they did, not to sell them at a less price than he offered to give, which was greater than any price asked on that day. This was done in an extensive market at *Worcester*, from whence, as it appeared, the northern markets principally received their supply. The consequences of such conduct might be easily foreseen, and were soon felt; hops which had been offered to be delivered on a day in *May* at 13*l.* *per cwt.* were on the same day sold at 15*l.*; and so the market continued to vary to the end of *June*. The sum then of the offence is, that the defendant, a merchant of credit and affluence in *Kent*, having a stock of hops in hand, went to the market at *Worcester*, not to buy hops, for that he disclaimed, nor to sell them, for upon the evidence it does not appear that he offered any for sale, but merely to speculate how he could enhance the price of that commodity. And for that purpose he declared to the sellers that hops were too cheap, and to the hop-planters that they had not a fair price for their hops: and lest he should be defeated in his speculation to raise the price of a falling market, he contracted for one fifth of the produce of two counties, when he had a stock in hand, and admitted that he did not want to purchase.

Upon this state of the case, however, it has been argued that no sentence ought to be pronounced, or if any, it should be a light one. As to the first point, that no sentence ought to be passed, or that judgment ought to be arrested, an answer has already been given; although whatever our opinion then was, if the court had felt that in justice to the defendant and to the public no judgment against him ought to be given, we should not hesitate to say so. When however we recollect the anxiety shewn by our ancestors to prevent the commission of this class of offences; and when we recollect what the common law as handed down to us by our ablest reporters and commentators upon this subject is; we cannot but deem that it would be a precedent of most awful moment for this court to declare, that hops, which are an article of merchandize, and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article the price of which it is a crime by undue means to enhance; or that the stat. 12 Geo. 3. c. 71. which expressly repeals certain specified statutes, was intended to repeal other statutes not specified, and to repeal that which the common law of the land has ordained for the protection of the poor, preventing the advancing of the price of those commodities without which they cannot exist.

In mitigation of punishment the Court has been repeatedly and strongly addressed upon the freedom of trade; as if it were requisite to support the freedom of trade that one man shall be permitted for his own private emolument

to inhanse the price of commodities become necessities of life, and thereby possibly prevent a large portion of his majesty's subjects from purchasing those necessities at all. The freedom of trade, like the liberty of the press, is one thing; the abuse of that freedom, like the licentiousness of the press, is another. God forbid that this court should do any thing that should interfere with the legal freedom of trade. In support of it the law has declared, and that law has repeatedly been acted upon, that to violate the freedom of trade by intercepting commodities in their way to market, taking them from the owner by force, or, which is the same thing, obliging him to accept a less price than he demands, and carrying them away against his will, or committing the like violation upon him in the market, is a capital offence, for which men have forfeited their lives to the law; for the law so far protects the freedom of trade as to encourage men to bring their goods to market, by punishing those who, by acts of violence deter others from so doing. But the same law that protects the proprietors of merchandize takes an interest also in the concerns of the public, by protecting the poor man against the avarice of the rich; and from all time it has been an offence against the public to commit practices to inhanse the price of merchandize coming to market, particularly the necessities of life, for the purpose of enriching an individual. The freedom of trade has its legal limits. No man under that liberty is permitted to dispose of his riches, in purchasing what, and of whom he pleases, nor when or where he pleases. It is notorious that there are certain goods which are contraband, which no man can by law trade in; there are other goods which none but persons especially authorised by the law can trade in; there are places to which none but persons authorized by law can resort for the purpose of trade; and there are persons with whom no trade can be legally carried on. I allude to the trade carried on by the *East India Company*; to naval stores, marked with the king's marks; to commerce with an enemy. For the sake of the public, and especially of the poorer part of his majesty's subjects, the law pays particular respect to the necessities of life; the price of which a man is not permitted to inhanse by undue means for his own private profit. In these and other respects, the freedom of trade has its limits, and is, and must, like all our other liberties, be regulated by law. That law, for the protection of those who are obliged to resort to market for the purpose of purchasing, we are bound to administer, as well as that which exists to protect those who resort to market for the purpose of selling. Looking into our books, we find that the commission of the offence stated in the information is a crime entitled to the serious attention of a court of justice, and that we are bound to treat it as such.

But it is urged, that the defendant, knowing that the statutes of the 3 & 4 Ed. 6, and 5 & 6 of the same reign, and other subsequent statutes, were repealed by the stat. 12 Geo. 3. c. 71, supposed that engrossing, forestalling, regrating, and every other offence by which men attempt wilfully and unnecessarily to inhanse the price of necessities of life and other merchandizes, ceased to be offences in the eyes of the law. This argument supposes him to have read that statute, and those which it repealed; and either to have considered the several laws upon the subject, or advised with others who have had a better opportunity so to do. Supposing him to have done this, the answer is, that that statute, of which he claims the benefit, does not apply to his case. That statute does not say, that such acts as this defendant has committed shall cease to be criminal. The effect of it only is, that for the commission of certain crimes specified in certain statutes (which are declaratory statutes, and consider the crimes therein mentioned as crimes at common law,) a man shall not be liable to certain penalties and punishments specified in those statutes. But this may be considered as the answer of men bred to the law. A better answer is, that this information is not exhibited for any offence contained in the statutes repealed. That the offence of

which the defendant has been convicted is a direct violation of the rules of just and honourable trade, which encourages every one to bring his goods to market and dispose of them to the best bidder. That the defendant has been guilty of using the undue means stated in the information for the purpose of obtaining an excessive and exorbitant price, higher than any that was demanded at the market, which he attended, for the commodity in which he dealt; by which means a temporary fictitious scarcity was likely to be produced, and the price of the commodity unnecessarily and unreasonably raised upon the public. And in truth, it must have occurred to any person considering the effect of the statute 12 Geo. 3, how improbable if not impossible, it was, that the legislature of a great and populous kingdom, ever anxious to provide for the most necessitous objects in it, should have intended by this statute to have taken from the lower and middling classes of men that security against the unnecessary high price of provisions, which the common law intended to give them; and not only to open a door, but throw out a temptation to rich men to speculate upon the price of the necessities of life at the risk and expense of the poor. Any argument, therefore, derived from the defendant's consideration of the statute of Geo. 3, if duly considered, can operate little in mitigation of his sentence: especially when it is recollected, that his attention to and conduct on the subject were awakened by the first application against him in this court, and that subsequent to it, in neglect at least, if not in defiance of the consequences, the facts on which this prosecution is founded were committed.

The Court having taken into consideration the nature and extent of the offence, and the time at which it was committed, when a punishment is peculiarly called for that may operate as an example to prevent others committing the like crime which so materially concerns all classes of men, at the same time having respect to the imprisonment the defendant has already suffered, do order and adjudge that he pay to the King a fine of 500*l.* and be further imprisoned in the prison of this court for one month, and until that fine be paid.

'The King v. Waddington(a).

Offences at Common Law. 1 East, 167. Feb. 11, 1801.

1. Engrossing hops of divers persons by name, with intent to re-sell at an unreasonable profit, and thereby enhance the price.
2. Engrossing hops then growing by forehand bargains, with like intent.
3. Buying large quantities of hops of divers persons mentioned, with intent to prevent their being brought to market, and to re-sell them at an unreasonable profit, and thereby enhance the price.
4. Buying all the growth of hops in several parishes by forehand bargains, with the like intent.
5. Buying hops of divers persons named, with the same intent as in the first count.
6. Buying all the growth of hops on certain lands in certain parishes by forehand bargains, with intent to re-sell at unreasonable price and enhance price.
7. Endeavouring to enhance the price of hops by persuading hop-owners not to sell, &c.
8. Engrossing by buying large quantities of persons unknown, with intent to re-sell at an exorbitant profit, &c.
9. Buying large quantities with like intent.
10. Buying hops then growing, with intent to re-sell at an exorbitant price and lucre.

THE defendant was tried before Lord *Kenyon*, and convicted generally on another indictment, the first count of which charged, that he, on the 20th of September 1799, at *Maidstone* in the county of *Kent*, did engross and get into his hands by buying on divers days and times between the 20th of Sep-

(a) See the last case.

tember 1798 and the 1st of *January* 1800, divers large quantities of hops, to wit, of one *T. W.* a certain large quantity of hops, to wit, 500 wt. of hops, (and so of twenty-five other persons by name other quantities) with intent and design to re-sell the said hops so by him engrossed and bought as aforesaid, for an unreasonable profit, and thereby greatly to inhanche the price of hops, to the evil example, &c. and against the peace, &c.

2d, That the defendant on the 10th of *November* 1799, at *Maidstone*, &c. did engross and get into his hands a large quantity (to wit) fifty acres of hops before that time planted and then growing on certain lands of one *J. A.* by a certain forehand bargain, that is to say, by contracting with the said *J. A.* to buy and take of him the said *J. A.*, and by persuading and procuring the said *J. A.* to contract to sell and deliver to him the said defendant at a certain large price, to wit, at the price of 10*l.* for each and every hundred weight of all the hops that should be grown by the said *J. A.* upon certain lands situate in the parish of *St. Paul* in the said county in possession of the said *J. A.*, then planted with hops by the said *J. A.*, with intent and design to re-sell the hops thereof coming, and every part and parcel thereof engrossed and bought as aforesaid, for an unreasonable profit, and thereby greatly to inhanche the price of hops, to the evil example, &c. and against the peace, &c.

3d, That defendant on divers days, &c. at, &c. did buy and cause to be bought, and did get into his hands a certain large quantity of hops by buying of one *T. W.* (and 27 others named therein) certain large quantities of hops (also specified) with intent to prevent the same from being brought to market for sale, and to re-sell the same for an unreasonable profit, and thereby greatly to inhanche the price of hops, in contempt, &c.

4th, That the defendant bought all the growth of hops on divers acres of land situate in the several parishes (named) by certain forehand bargains, viz. by bargaining with one *T. S.* (and 38 others named) to buy all the hops then growing or that should be growing in the then next season on certain lands in the said several and respective parishes (named) at a certain large price, viz. at the rate of 10*l.* for every hundred weight, &c. with the like intent as in the last count.

5th, That the defendant bought and got into his hands by buying of *T. W.* (and 27 other persons named) a certain large quantity of hops (therein mentioned) with intent to re-sell the same for an unreasonable profit, and thereby greatly to inhanche the price of hops.

6th, That the defendant bought all the growth of hops upon divers acres of land situate in the several parishes (named) by certain forehand bargains, viz. by bargaining with *T. S.* (and 38 others named) at a certain large price, viz. 10*l.* for every hundred weight of the hops then grown or that should be grown in the next season upon the said lands, with intent to re-sell the hops thereof coming for an unreasonable price, and thereby greatly to inhanche the price, &c.

7th, That the defendant unlawfully endeavoured to promote and inhanche the price of hops, by persuading and attempting to persuade divers persons dealing in hops and accustomed to sell hops, and having large quantities of hops for sale, not to go to any market or fair with any hops for sale, and to abstain from selling such hops for a long time, in contempt, &c.

8th, That the defendant between the 2d of *September* 1798, and the 1st of *May* 1800, did unlawfully engross and get into his hands, by buying of divers persons unknown, divers quantities amounting to 2000 tons of hops, with intent to re-sell the same at an exorbitant profit, and thereby greatly to inhanche the price of hops.

The 9th count was the same as the last, only omitting the charge of *engrossing*, and confining it to a *buying*.

10th, That the defendant at the said times bought of divers persons unknown the growth of divers, viz. 2000 acres of hops then growing upon 2000

acres of land situate in the several parishes (named) at a large price, viz. at the rate of 10*l*. for every hundred weight of hops that should be grown upon the said land, with intent to re-sell the hops thereof coming for an exorbitant price and lucre, and thereby greatly to inhanche the price of hops, to the evil example, &c. and against the peace, &c.

Lord KENYON, C. J. reported the evidence given at the trial, which in his judgment was sufficient to go to the jury upon all the counts: and that they found a general verdict against the defendant. The principal part of the evidence related to the forehand bargains made by the defendant with different planters for their growing crop of hops; a practice however which appeared to have prevailed for a considerable period of time in *Kent*, and without which some of the witnesses stated that in their judgment the cultivation of this plant, the expence of which was exceedingly heavy, could not be generally carried on. There was also evidence of the defendant's having bought up very large quantities of the commodity to an unusual amount, and by making unusual advances of money; and that he had held out language of inducement to other persons dealing in the same article to withhold their stock from the market with a view to a rise in the price. This last-mentioned evidence applied to the 7th count, the only one the proof of which was afterwards contested at the bar, but without effect.

The defendant's counsel, by his desire, in this as in the former case, disclaimed moving in arrest of judgment or for a new trial; and as the general turn of the arguments were similar to those before urged, it is not necessary to detail them, but only to notice the new matter.

Law, Bond, Wood, Dauncey, Clifford, and Peake, for the defendant, observed, that the long existence of the practice of making forehand bargains for hops was in itself some argument for their legality; more especially as many actions have been brought in the shape of actions on wagers for damages founded on the breach of such contracts, or to compel their execution. This too is aided by the consideration that without the help of these bargains men of moderate capital by whom the market must be generally supplied could not incur the heavy expence of cultivating this plant. The stat. 5 & 6 Ed. 6, c. 14, s. 3, only prohibits the purchase of growing corn; and therefore it may be presumed that the offence of engrossing at common law by making such bargains was confined to grain alone: and the only instance mentioned of a judgment against any one for what may be considered as a forehand bargain is *Hadham's* case in 3 Inst. 197, which was the case of a sale of corn in the sheaf before it was threshed and measured. But that was because the article sold was otherwise than by measure, which is the proper and usual method of selling corn; whereas hops are sold by weight, in which there can be no deceit. At any rate, it cannot be considered as engrossing to have made forehand bargains for 258 acres out of 30,000 acres in cultivation of the same article in the county of *Kent* alone. And if such bargains be not illegal, they cannot be laid or given in proof as the means to carry into effect an illegal intent. They also mentioned several statutes and cases to shew that hops were in use and the growth encouraged long prior to the case in 20 Jac. 1(a), where hops were resolved by all the Judges not to be a victual within the stat. 5 & 6 Ed. 6, c. 14, viz. the 5 & 6 Ed. 6, c. 5. 5 Eliz. c. 2. 39 Eliz. c. 1, 2. 1 Jac. 1, c. 18. A case in 3 Jac. 1. Hutt. 78. *Barham v. Goose*, Hil. 14 Jac. 1. 2 Danv. Abr. 596, pl. 3. Also so far back as the 6 Hen. 6, there was a petition in parliament against the use of hops.

Erskine, Garrow, Gibbs, Scott, and Harrison, in support of the prosecution, said that the substance of the offence with which the defendant was charged in all but the 7th count, was the ingrossing a large quantity of hops by buying them from various persons by forehand bargains and otherwise at

a certain price with intent to re-sell them at an unreasonable profit, or an exorbitant price. This in its nature is like the offence of monopolizing(a), which has never been denied to be highly criminal at common law, tending to the destruction of trade, and to the inhancing of the price of commodities to the public. It would be absurd to suppose that this power, which has been denied to the Crown, should be considered as a lawful practice in an individual. For before the stat. 21 Jac. 1, c. 3, the procuring licences from the Crown for a monopoly was an offence at common law. 3 Inst. 181.

GROSE, J. now passed sentence upon the defendant; adverting to what he had before said upon the first indictment; and that it now appeared that the defendant had carried on these practices to a much greater extent; and that the particular offence of engrossing, which still remained an offence at common law, was calculated to create an artificial scarcity where none existed in reality, and to aggravate that calamity where it did exist. The defendant was, therefore, adjudged for this offence to pay a fine to the King of 500*l.*, and to be further imprisoned in the prison of this Court for three months, to be computed after the expiration of his former imprisonment, and further until the fine were paid.

The King v. Micah Gibbs.

1 East, 178. Jan. 28, 1801.

The sessions have no jurisdiction over the offence of forgery at common law, nor can they take cognizance of it as a cheat.

AN indictment was preferred and found against the defendant at the General Quarter Sessions of the Peace for the county of *Somerset*; the first count of which charged, that he being a person assessed to certain duties granted by an act passed in the 39 Geo. 3. (c. 13.) intitled, "An act to repeal the duties imposed by an act made in the last session of parliament for granting an aid and contribution for the prosecution of the war, and to make more effectual provision for the like purpose, by granting certain duties upon income in lieu of the said duties," by *E. R., J. L., and S. D. Esquires*, commissioners for the purposes of the said last-mentioned act; and of another act passed in the same year (c. 22.) intitled "An act for extending the time for returning statements under an act, &c. (*viz.* the former act), and to amend the said act;" and of another act passed in the same year (c. 42.), intitled "An act to enable the commercial commissioners, appointed to carry into execution certain acts for granting duties upon income, to extend the time limited by the said acts for receiving returns of income, and for explaining and amending the said acts;" and acting in and for the division of *bath forum* in the said county, and duly authorized in that behalf; and under pretence of thinking himself aggrieved by the said assessment, did afterwards, to wit, on the 19th of June 1799, at, &c. appeal from the said assessment to Sir *A. E., P. S., and J. M. R.*, being commissioners duly appointed to hear and determine appeals relating to the said duties on income in and for the eastern district of the said county; and afterwards, to wit, on, &c. at, &c. did appear before the said last-mentioned commissioners and prosecute his said appeal; and the defendant wickedly contriving and intending to deceive the said commissioners of appeal, and to induce them to believe that the particulars of his income and of the deductions claimed by him from the amount of such income had been inquired into, examined, and approved by one *Richard Else*, then and there being clerk to the said commissioners by whom the said assessment had been made; and with an iniquitous and fraudulent intention to give effect to his

said appeal, and to evade being finally assessed to the full amount of the duties with which he was chargeable in respect of his income, and to defraud his majesty of certain duties justly chargeable upon the income of the said defendant; on, &c. at, &c. with force and arms, at the bottom of a certain piece of paper, purporting to be a schedule of the particulars of the income of the said defendant, did wickedly subscribe and falsely forge and counterfeit, and cause to be falsely forged and counterfeited the letters and initials following; that is to say, the letters *R. E.* purporting to be the initials of the name of the said *Richard Else*, then and there being clerk to the said first-mentioned commissioners, and to be written by the said *Richard Else*; and did, in further prosecution of his iniquitous intention aforesaid, then and there produce and exhibit to the said commissioners of appeal the said piece of paper with the said letters and initials so falsely forged and counterfeited thereon, as aforesaid, in contempt, &c. and against the peace, &c.

The second count was the same as the first, except that it charged that the defendant, intending to induce the commissioners of appeal to believe that certain particulars of his income and of certain deductions claimed by him thereupon, had been examined by the said *Rd. Else*, (not stating who *Rd. Else* was,) and with an iniquitous and fraudulent intention to give effect to his said appeal, and to evade the being finally assessed to the full amount of the duties with which he was chargeable in respect of his income, and to defraud his majesty of certain duties justly chargeable upon the income of the said *Micah Gibbs*, on, &c. at, &c. with force and arms a certain piece of paper, purporting to be a schedule of the particulars of income of the defendant, whereon were falsely forged and counterfeited the letters and initials following; that is to say, the letters *R. E.* purporting to be the initials of the name of the said *Richard Else*, then and there being clerk to the commissioners for the purpose of the said acts, and to be written by him the said *Richard Else*, did wickedly, unlawfully, and fraudulently publish and cause to be published, and did in further prosecution of his iniquitous intentions aforesaid, then and there produce and exhibit to the said commissioners of appeal the said piece of paper, with the said letters and initials so falsely forged and counterfeited thereon as aforesaid, he the defendant then and there well knowing the said letters and initials so published as aforesaid to be false, forged, and counterfeited, in contempt, &c. and against the peace, &c.

The third count charged, that the defendant, being a person assessed to certain duties granted by an act passed in the 39 Geo. 3. (c. 13.), intituled, &c. and having appealed against the assessment made upon him to the said duties, he the said defendant wickedly contriving and intending to deceive certain commissioners before and by whom such appeal was to be heard and determined, in pursuance of the acts in such case made and provided, and with an iniquitous and fraudulent intention to induce the commissioners, by whom such appeal was to be heard and determined in pursuance of the acts in such case provided, to believe that the particulars of the income of the said defendant, and of the deductions claimed by him from the amount of such income, had been inquired into and examined by one *Rd. Else*, then and there being clerk to the commissioners by whom such assessments had been made, and with an iniquitous intention to give effect to the said appeal, and to evade the being finally assessed to the full amount of the duties chargeable upon him in respect of his income, afterwards, to wit, on, &c. at, &c. with force and arms, upon a certain piece of paper purporting to contain the particulars of the income of him the said defendant, and of the deductions therefrom, did wickedly subscribe and falsely forge and counterfeit the letters and initials following, (*viz.*) the letters *R. E.* purporting to be the initials of the name of the said *Rd. Else*, in contempt, &c. and against the peace, &c.

The fourth count charged, that the defendant being assessed to certain duties granted by an act passed in the 39 Geo. 3. (c. 13.), intituled, &c. and

thinking himself aggrieved thereby, and having appealed therefrom, he the defendant wickedly contriving and iniquitously intending to cause the amount of the assessment made upon him to be diminished, without any just cause, afterwards, to wit, on, &c. at, &c. with force and arms, a certain other piece of paper, purporting to contain the particulars of his income, and of the deductions by him claimed to be made thereon, at the bottom of which said paper were falsely forged and counterfeited the initials of the name of the said *Richard Else*, then and there being clerk to certain commissioners by whom the assessment had been made on the said defendant, did wickedly, unlawfully, and fraudulently publish and cause to be published, he the defendant then and before well knowing the said letters *R. E.* at the bottom of the said piece of paper so published as aforesaid to be false, forged, and counterfeited, in contempt, &c. and against the peace, &c.

To this indictment the defendant pleaded *Not guilty*: and at the sessions holden for the said county on the 8th October 1800, was found guilty, and judgment was given by that Court, that for the offences specified in the indictment he should be fined 200*l.* and be imprisoned for six calendar months, and until such fine should be paid. In *Michaelmas* term last, the defendant brought a writ of error, and assigned the common errors.

Burrough, for the defendant below, took several objections to the indictment; 1. (which goes to the whole,) The substantial charge in all the counts, if any, is the commission of a *forgery*, an offence which the Quarter sessions have no jurisdiction to try. In cases of misdemeanor they can only try breaches of the peace, or such acts as have a manifest tendency thereto. The word *trespasses* in the commission of the peace(a), (the only word under which the jurisdiction to try this offence can be sustained, if at all) has always had that construction. 2 Hawk. c. 8. s. 38. Wherever the sessions have exercised jurisdiction over any other description of misdemeanor, it has been by virtue of particular statutes giving them such jurisdiction in express terms; as in the instance of perjury, by the stat. 5 Eliz. c. 9. s. 9.: and it has been long settled, that no indictment for that offence will lie at the sessions, unless it be laid against the form of the statute(b). Now forgery is no more a breach of the peace, nor has any more tendency to it, than perjury. Serjeant *Hawkins*, in the place above referred to, says expressly, "that it hath been of late settled that justices of peace have no jurisdiction over forgery or perjury at the common law:" and then assigns as the particular reason, that the chief object of their institution was "for the preservation of the peace against personal wrongs and open violence." He cites in support of his opinion the case of *The Queen v. Yarrington*(c) as in point. That was an indictment found at the sessions for forging a letter in the name of J. S., and being removed into B. R. by *certiorari* was quashed, because the Sessions had no jurisdiction over the offence. Since then it appears that the question has been at rest, and therefore no subsequent authorities are to be found: but every authority which shews that the Sessions have no cognizance of perjury at common law will equally apply to this case. There is a good reason why that court should not have had jurisdiction over this offence conferred upon it, because there is none in which so many intricate questions arise; and it is the policy of the law to refer all such to the cognizance of the superior courts. But *2dly*, (which also goes to the whole indictment) No offence of any kind is stated. In order to constitute an offence there must be something done, which is calculated to bring a burthen or mischief upon some individual or upon the public. Now the whole charge here consists in hav-

(a) Vide the commission of the Peace, set out in the 3d vol. of Burn's Justice, tit. *Justices of the Peace*.

(b) Vide *Rez v. Bainton*, 2 Stra. 1088.

(c) M. 9 Ann. Salk. 406.

ing placed or forged, as it is called, the letters *R. E.* at the bottom of a certain schedule. Then in order to constitute criminality in such an act it must be shewn that *Richard Else*, whose initials they are said to be, had some duty, imposed upon him by some statute, connected with the schedule; and that the commissioners of appeal were bound to take legal notice of his signature affixed to the paper in question. And it should have been stated that it was the duty of *Richard Else* to have put his initials or signature to the paper for certain purposes. On the contrary, upon looking into that act it appears that no duty whatever is thrown upon this clerk: he is no more than a mere agent or actor under the commissioners and every act done by the commissioners is presumed to be done by themselves personally, and not superinduced upon the act of the clerk. Now here the first count alleges the criminal intent in putting the initials *R. E.* to the paper to be this, in order to induce the commissioners to believe that the account had been "inquired into, examined, and approved" by the said *Richard Else*; and the second and third counts are to the like effect: but the putting those initials with such intent is no offence known to the law. Then the fourth count for publishing such paper cannot be an offence, if the forgery itself were not so. 3dly, The three first counts charge that the defendant forged the initials *R. E.* purporting to be the initials of the name of *Richard Else*. But nothing can be introduced under the word *purport* but what is apparent on the face of the instrument, and it could not be apparent on the face of the schedule of the defendant's income that *R. E.* meant *Richard Else*. This objection has been holden fatal in several cases of forgery. *R. v. Jones*, Dougl. 302. *R. v. Reading*(a), *R. v. Gilchrist*(b), and lastly in *R. v. Edsall*(c). 4thly, Every indictment for forgery must set out the forged instrument in words and figures(d); so that after the jury have done their office, the Court may be enabled to see upon the face of the indictment itself whether the forgery of such an instrument be a crime, and if so, of what degree. The schedule itself therefore at the bottom of which the letters *R. E.* were put should have been set forth in the indictment, in order that the Court might see whether it were a schedule, within the meaning of the act of parliament(e). The appeal was not in respect of the signature, but of the sche-

(a) This was an indictment, tried before *Grose, J.* at the *O. B.* in 1798, charging that the defendant, having in his possession a bill of exchange, purporting to be directed to one *J. King* by the name and description of *J. Ring*, forged the acceptance of the said *J. King*, &c. Upon reference to the Judges in *Hil.* term 1794, judgment was arrested, because the bill did not purport to be drawn upon *J. King*. MS.

(b) This case was tried before *Buller, J.* at the *O. B. Feb.* 1797, and was an indictment for forging an order for payment of money, stating that it "purported to be directed to *George Lord Kinnaird, Wm. Moreland, and Thos. Hammersley*, bankers, and partners, by the names and description of Messrs. *Ranson, Moreland, and Hammersley*," &c. After conviction, judgment was arrested in *Easter* term 1796, by the advice of all the Judges; because the word *purport* imports what appears on the face of the instrument. MS.

(c) This was to the same effect. The prisoner was tried before *Thompson, B.* at the Spring Assizes 1798, for the county of the town of *Southampton*, on an indictment for forging a bill of exchange, charging that the bill purported to be directed to *Richd. Down, Henry Thornton, John Freer, and John Cornwall Jun.* bankers in *London*, by the name and description of Messrs. *Down, Thornton and Co.* bankers, &c. On reference to the Judges in *Trin.* term 1798, the indictment was holden to be bad on the authority of the preceding cases. MS.

(d) This was so ruled in *James Mason's* case, who was tried before *Buller, J.* at the Summer Assizes for the county of *Northumberland* in 1792, on an indictment for forging a bill of exchange; and afterwards, at a conference of all the Judges, in *Trinity* term 1793. On the same principle *Lloyd's* case was ruled before all the Judges in *Trinity* term 1767, in the case of an indictment for sending a threatening letter; where it was determined that the letter must be set forth in the indictment. MS.

(e) Yet in *Wm Testick's* case, who was tried at *Bodwin Summer Assizes* 1774, upon an indictment for publishing a forged receipt for money with the name *Stephen Withers*, &c. for the sum of 11. 4s. the receipt itself only was set forth as follows: "18th March 1773. Received the contents above by me *Stephen Withers*." And it appearing in evidence that the above was forged at the bottom of a certain account, it was objected that the account itself should

dule itself; therefore, the mere signature without the schedule could not have had the effect attributed to it upon the indictment. *5thly*, Where a statute creates a new offence, and at the same time points out a particular method of proceeding, that method alone and no other can be pursued. Now by the stat. 39 Geo. 3. c. 13. s. 92. persons guilty of any fraud of this kind are punishable by being doubly assessed. *6thly*, The last count states, that he published the paper knowing the said letters *R. E.* at the bottom of the said paper so published to be forged: and there is nothing before said in that count of the letters *R. E.* except by intendment, as being the initials of *Richard Else*; which is not sufficient.

Pell, contra. First taking the offence charged to be that of forgery properly so called, no sufficient reason is assigned either by *Hawkins*, 2 Hawk. c. 8. s. 38, or in the case of *The Queen v. Yarrington*, Salk. 406, on which alone *Hawkins* founds his opinion, why the sessions should not take cognizance of the offence. *Burn(a)* states, that from the stat. 1 Ed. 3., by which justices of the peace were first assigned to keep the peace in every county, down to the third year of Queen *Elizabeth*, their jurisdiction had been from time to time enlarged by a variety of statutes; about which latter time the form of the commission of the peace was settled by Sir *Christopher Wrey*, C. J. of B. R. and the other Justices, and has continued the same to this day with little variation. This gives the justices jurisdiction to punish offenders against any ordinances and statutes for the good of the peace, and for the quiet rule and government of the people: also to inquire of all manner of felonies, *trespasses*, &c. and of all other crimes and offences of which the justices of the peace may or ought lawfully to inquire; with other general words to the same purpose. These terms are certainly large enough to cover the offence of forgery. *Hawkins* himself, in commenting upon the word *trespasses*, states it to be of very general extent, and in a large sense to comprehend not only all inferior offences properly and directly against the peace, but also all others which are so only by construction, as all *breaches of the law* are said to be. According to his own definition, therefore, forgery would be included, being constructively a breach of the peace inasmuch as it is a breach of the law: and the exception which he afterwards introduces in respect of forgery is in contradiction to what he had just before said. The case, then, of *The Queen v. Yarrington* is the only authority on which the position stands, and that is certainly not law to the full extent of the doctrine there laid down; for it is there said, that justices of the peace have no jurisdiction over any offence than what is given to them by some statute; but *Hawkins* shews many instances to the contrary: and in 4 Com. Dig. tit. *Justices of the Peace*, B. 33. it is said, "they may inquire of any thing done to the fraud or deceit of another." Now forgery is of that kind; though like other frauds it is no direct breach of the peace, nor has any immediate tendency thereto; and Lord C. B. *Comyns* instances, "as if a man read a writing to an illiterate person in other words than were written, by which means he seals it." For which he cites 1 Sid. 312. "Or if a man play with false dice." 2 Roll. 107. It is not disputed that the sessions have jurisdiction over cheats, which *Hawkins*, 1 Vol. ch. 71. s. 1, describes to be "deceitful practices in defrauding or endeavoring to defraud another of his own right by means of some artful device," &c. That definition includes the present case. So *R. v. Brayne*, M. 12 Geo. 1. (in the Crown Office) was an indictment found at the *Bristol* sessions for fraudulently obtaining tea in the name of another; which was removed into this court by *certiorari*, and no objection taken to the jurisdiction of the

have been set forth: otherwise *non constat* that the receipt as stated was a receipt for money. But upon reference to all the Judges in *Michaelmas* term 1774, they held the indictment sufficient; for it was laid to be a forged receipt for money under the hand of *S. W.* for 11. 4s. and the bill itself was only evidence to make out that charge. MS.

(a) 3 Vol. 4-5. tit. *Justices of the Peace*. 2. *Of the Commission*, &c.

sessions. Again, the case of *R. v. Beale*, E. 38 Geo. 3. was an indictment against the defendant, who was clerk to the agent for the *French* prisoners of war at *Porchester Castle*, for taking bribes in order to procure the exchange of some of them out of their turn. This was found at the *Hampshire* sessions, and being removed hither by *certiorari* the Court inflicted a heavy punishment upon the defendant, without any question of the jurisdiction. The like was the case of *R. v. Rispal*, 3 Burr. 1320, where the Court held that the sessions had jurisdiction to find an indictment for a conspiracy to injure a man's credit by falsely charging him with having taken a quantity of hair out of a bag. None of these offences were properly breaches of the peace, or tending thereto. But 2dly, although the paper in question be called a forged paper or instrument in the indictment, yet that will not constitute the offence a forgery if it be not so in law. Now this does not come under the legal definition of a forgery, which according to Lord Coke, in 3 Inst. 168, is properly taken when the act is done in the name of another person: as in *R. v. Ward*, 2 Ld. Ray. 1461. 2 Stra. 747. 1 Sid. 142, and in *R. v. Yarrington*, which appears by reference to the record in the Crown Office to have been a forgery in the name of *J. Caruthers*, and thereby attempting to get a quantity of earthen ware delivered to the defendant. In *Robinson's* case(a), which was an indictment on the stat. 9 Geo. 1. c. 22, for sending a threatening letter without any name subscribed thereto, it appeared to be signed with the letters *R. R.*, and this was holden not to be the signature of a name. [*Le Blanc, J.* Can it be contended, that forgery cannot be committed by signing the initials of a name, for example, as an acceptance on a bill of exchange, which in common experience is frequently the case?] Perhaps it would be so in that case, because the acceptance of bills in that manner is sufficient according to the custom of merchants; and it would be sufficient to bring the case within the statute. But this not being in the name of another, is not a forgery at common law, but is indictable as a fraud upon the revenue, and against the act of parliament which prohibits such practices, and is therefore a public cheat of which the sessions have cognizance. [*Le Blanc, J.* What was the legal effect of signing this name to the paper taking it to have been written at length?] It was calculated to shew that it was the opinion of the clerk to the commissioners acting in the capacity of their servant or agent, that the defendant was rated too highly. It therefore amounts to the same thing as defrauding the master by making use of the servant's name to gain credit for a falsity.

Lord KENYON, C. J. An indictment for a cheat at common law cannot be maintained without some false token be made use of: a mere false affirmation is not sufficient(b). However, the main difficulty to get over in this case is the want of jurisdiction in the quarter sessions. I have always had a general impression on my mind that it was a settled point that forgery was not under the cognizance of the sessions; and I rather think it was so determined soon after I came to the bar, though I do not remember the particular case. But I am sure it has been always so considered by the profession in my remembrance, and I have formerly given opinions to that purpose. Therefore, with all the inclination which I feel against giving way to small objections, I cannot get over this against express authority and received practice for so long time. I must also consider this as an indictment for forgery; it is so

(a) *Leach's Crown Cas.* last edit. 2 vol. 889. Mr. Justice Buller, in delivering the opinion of the judges at the *O. B.* in this case said, "As to the first objection: Whether the letter be with or without a name (the indictment charged it to be without a name) is a simple fact appearing on the face of the letter itself. It is signed with the two letters *R. R.* which are so far from being a name that no man on looking at the letter only can tell whether it meant to refer to any name or what that name was." MS.

(b) *Vide Rex v. Lara*, 7 Term Rep. 565. [See also *The People v. Babcock*, 7 Johns. Rep. 201.]

stated in every count: and it is no answer to say, that if a man be indicted for one offence he may be convicted because he is guilty of another kindred offence. The case of *The Queen v. Yarrington*, stands supported by concurrent opinions down to the present time, and has been acted upon nearly a century; it is now too late to disturb it. The offence, however, is of a very serious case, and no blame is imputable to the magistrates below for what they have done, though the judgment cannot be supported in point of law.

LE BLANC, J. Even if the objection to the want of jurisdiction had been removed, it would have been found very difficult to have answered the other objections.

Per Curiam,

Judgment reversed.

The King v. Barker.

1 East, 186. Jan. 29, 1801.

The Court refused a criminal information against a magistrate for returning to a writ of *certiorari* a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned being warranted by the facts.

GIBBS and *Best* moved for a criminal information against the defendant, who was mayor of the borough of *Great Yarmouth*, upon these facts disclosed by affidavit: That a warrant of distress issued on the 20th of *October* last, under the hand and seal of the defendant, against one *Jonathan Symonds*, by virtue of which his goods were taken in execution; in consequence of which application was made on behalf of *Symonds* to the defendant's clerk for copies of the warrant and of the proceedings on which the defendant had granted the same, which the clerk promised to give on the next day. And accordingly on the 21st, the clerk furnished *Symonds* with a copy of a conviction, dated 3d *October* 1800, which was compared with the original signed by the defendant, then being upon the file of informations and other proceedings taken and recorded before the defendant during his mayoralty. That in *Michaelmas* term last, *Symonds* obtained a writ of *certiorari* directed to the defendant to return the conviction into this court, in consequence of which the defendant returned a record of conviction in a different form from that of which *Symonds* had been furnished with a copy; which conviction so returned purported to bear date on the 3d of *October* 1800, although the deponent had reason to believe, from conversation with the defendant's clerk, that no conviction had been signed by the defendant against *Symonds* till a fortnight afterwards; and *Symonds* swore that he had not been charged with more than one such offence as that mentioned in the conviction.

The conviction itself returned, and the copy which had been previously given to *Symonds* by the defendant's clerk, were both annexed to the affidavit; and from comparing them it appeared that they related to the same offence, committed on the same day, and under the like circumstances: but the conviction returned to this Court was drawn out at more length, and in a more formal manner than the one from which *Symonds'* copy had been taken.

It was pressed against the defendant that the conduct pursued by him upon this occasion tended to much vexation and oppression against parties convicted, and was in itself illegal. That however magistrates might be indulged with a reasonable time for drawing up their convictions in proper form, yet when regularly signed and issued by them to the parties, and acted upon as such by levying a distress under them, they ought to be concluded from altering them afterwards. That this practice led the parties to incur an unnecessary expence; as in the present instance, where *Symonds* having been furnished with the copy of the then form of conviction, which was clearly bad,

was thereby induced to incur the expence of prosecuting a writ of *certiorari* in order to relieve himself from it.

Garrow, on the part of the magistrate, suggested that the copy with which *Symonds* had been furnished was merely intended as a copy of the minutes of the conviction; and that it was the constant practice of magistrates to proceed in this manner, first taking down minutes of the proceedings on which their judgment was founded, and afterwards having them drawn up in form before they were filed of record.

Lord KENYON, C. J. If the magistrate has done no more than return the conviction in a more formal shape, instead of sending it up in the informal manner in which it was first drawn, and supposing that the facts as they really happened will warrant him in the return he has now made, the contrary of which is not imputed, I am of opinion that it was not only legal but laudable in him to do as he has done, and he would have done wrong if he had acted otherwise. It is a matter of constant experience for magistrates to take minutes of their proceedings, without attending to the precise form of them at the time when they pronounce their judgment, to serve as memorandums for them to draw up a more formal statement of them afterwards to be returned to the sessions: and it is by no means unusual to draw up the conviction in point of form after the penalty has been levied under the judgment. Nor is there any legal objection to this method, provided the facts will warrant them in stating what they do. It is no answer to say that a party convicted may be thereby induced to incur an unnecessary expence in suing out a *certiorari* to get rid of an informal conviction; for a mere informality in the manner of drawing up the conviction ought not to be the inducement for removing it into this court, but some substantial defect in the justice and legality of the proceeding itself before the magistrate.

Per Curiam,

Rule refused(a).

The King v. Symonds.

1 East, 189. Feb. 7, 1801.

Where an act gives power to a magistrate on a summary conviction to award the reasonable charges of taking a distress, he must ascertain the amount in the conviction; and an adjudication that the defendant shall pay the reasonable charges of the levy is bad.

THE conviction returned to the writ of *certiorari* mentioned in the last case was founded upon the stat. 7 Geo. 1. c. 11, and was as follows:

Town and borough of *Great Yarmouth* in *Norfolk*. Be it remembered, That on the 1st of *October* in the 46th year of the reign, &c. at *Great Yarmouth* in the county of *Norfolk*, *E. H.*, in his proper person cometh before *Samuel Barker*, Esq. mayor, and one of his majesty's justices of the peace of our said lord the king in and for the said borough and then and there upon his corporal oath giveth me the said mayor to understand and be informed, that *J. Symonds*, of *Great Yarmouth* aforesaid, merchant, after the 25th of *March* 1721, to wit, on the 20th *September* 1800, did land within the town of *Great Yarmouth*, from out of a wherry, *B. S.* master, twelve chaldron of coals, for which the rates and duties charged thereon by an act of parliament made in the seventh year, &c. (7 Geo. 1. c. 11,) had not been paid, without a certificate in writing being given to the said *J. S.* by the collector or receiver of the said rates and duties for leave to land or bring the said twelve chaldrons of coals into the said town; contrary to the form of the statute in that case made and provided, whereby the said *J. S.* hath forfeited the sum of 20s. for

(a) See the next case.

every chaldron of the said coals so brought into the said town as' aforesaid, amounting in the whole to the sum of 12*l.*, over and above the rates and duties by said act charged on said coals, one moiety thereof to the use of the informer, and the other moiety to the use of the poor of the said parish of *Great Yarmouth*, &c. [The conviction then proceeded to state in the usual form the summons to the defendant to appear and answer the charge: his appearance, &c. and confession. It then proceeded:] It is therefore adjudged by me the said mayor, upon the free and voluntary confession of the said *J. S.* that all and singular the matters and things contained in the said information are true; and thereupon I the said mayor, on the said 3d of *October* in the year aforesaid, at *Great Yarmouth* aforesaid, in the county aforesaid, do convict the said *J. S.* of the said offence in and by the said information charged against him, and he the said *J. S.* is hereby convicted thereof by me the said mayor, upon his own free and voluntary confession, according to the form of the statute in such case made and provided; and I do adjudge that the said *Jonathan Symonds* for the offence aforesaid hath forfeited the sum of 20 shillings for every chaldron of said coals, amounting in the whole to the sum of 12*l.*, over and above the rates and duties by said act charged on said coals, together with the reasonable charges of recovering the same: and I do adjudge that one half of the said sum of 12*l.* be paid to the said informer *E. H.* and the other half the said sum of 12*l.* be paid to the poor of the parish of *Great Yarmouth* aforesaid, according to the form of the statute in such case made and provided. In witness whereof, &c.

S. Barker. (L. S.)

Gibbs and *Best* objected, 1. That the convicting magistrate is stated to be a justice of peace for the borough of *Great Yarmouth*, and the offence is alleged to have been committed within the town of *Great Yarmouth*, and *non constat* that the borough is co-extensive with the town, and that the magistrate had cognizance of the offence. 2. The penalty is to be given half to the informer and half to the poor of the parish where the offence is committed. But here the latter moiety is given to the poor of the said parish of *Great Yarmouth*, which parish is not named before, and *non constat* that the offence was committed there; neither is the parish stated to be within the county of *Norfolk*. 3. The magistrate adjudges to the informer the reasonable charges of recovering the penalty, and does not ascertain what the sum shall be (a).

Garrow, contra, admitted that the last objection was fatal; though the statute on which the conviction was founded gives power to the convicting magistrate to order the costs and charges of levying the distress to be paid by the defendant.

The Court were of that opinion, and

Quashed the Conviction.

Chaplin v. Rogers.

1 East, 192. Jan. 29, 1801.

After a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person (by whom, though against the vendee's approbation, it was taken away) is sufficient to warrant the jury in finding a delivery to and acceptance by the vendee, thereby taking the case out of the statute of frauds.

IN an action for goods sold and delivered, the case proved was, that the parties being together in the plaintiff's farm yard, the defendant, after some

(a) The act in question (s. 5.) enables the mayor of *Yarmouth* to cause the penalties to be levied by distress, "together with the reasonable charges of taking and keeping such distress," &c. See *Rex v. Hall*, Cowp. 60, where the conviction was quashed on the same objection.

objections and doubts upon the quality of a stack of hay (particularly the inside part) then standing in the yard, agreed to take it at 2s. 6d. per hundred weight. Soon after he sent a farmer to look at it, whose opinion was unfavorable. But about two months afterwards another farmer of the name of *Loft* agreed with the defendant for the purchase of some of this hay still standing untouched in the plaintiff's yard, and the defendant told *Loft* to go there and ask what condition it was in, saying he had only agreed for it if it were good. The plaintiff having informed *Loft* it was in a good state, he agreed to give the defendant 3s. 9d. per cwt. for it, the defendant having told him that he agreed to give the plaintiff 3s. 6d. for it. *Loft* thereupon brought away thirty-six hundred weight; but this latter fact was without the knowledge, and against the direction of the defendant. There was a contrariety of evidence as to the quality of the hay when the stack was afterwards cut. At the trial before *Hotham*, B. on the last *Norfolk* circuit, *Sellon*, Serjt. for the defendant, objected that the contract of sale was fraudulent and void by the statute of frauds, being for the sale of a commodity no part of which was delivered, and of which there was no acceptance by the defendant. But the learned Judge left it to the jury to decide whether the sale had been fraudulent, and whether under the circumstances there had been an acceptance by the defendant; and they found for the plaintiff on both points, and gave him 50l. damages, being the value of the hay at the price agreed for. In the last term, a rule was obtained calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on the grounds that the learned Judge had left that as a question of fact to the jury, which he himself ought to have decided as an objection in point of law arising on the statute of frauds; and because the evidence did not warrant the verdict.

Wilson now shewed cause. The objections may either be regarded as arising upon the statute of frauds, 29 Car. 2. c. 3. s. 17, or upon the form of the count for goods sold and delivered, which requires proof of a delivery as well as a sale. Now there was sufficient evidence of a delivery to and acceptance by the defendant, and the jury having found the fact with the plaintiff, the case is taken out of the statute of frauds. The bulk of the commodity purchased precluded any actual delivery of it; but that which took place was tantamount to it. Both parties were upon the spot at the time, and considered the bargain as concluded, and the stack in the possession of the defendant. The defendant afterwards acted upon it as such, and sold part of it to another person, which is evidence in itself of his having taken possession of it. Besides, that person actually removed part of it away; and though this is stated to have been against the defendant's direction, yet that cannot avail as between these parties, with respect to whom *Loft* must be considered as the defendant's agent acting within the scope of his authority, the excess being without the knowledge of the plaintiff. The question of fraud left to the jury was as to the existence of any fraud in fact.

Garrow, contra. The form of the declaration required proof of a delivery in fact of the goods, otherwise the count for goods bargained and sold would be useless. Though the jury were the proper judges how far the plaintiff had been guilty of any fraud in fact, yet the judge ought to have decided upon the question of law submitted to him, whether upon the case proved it did not fall within the statute of frauds.

LORD KENYON, C. J. It is of great consequence to preserve unimpaired the several provisions of the statute of frauds, which is one of the wisest laws in our statute book. My opinion will not infringe upon it; for here the report states, that the question was specifically left to the jury whether or not there were an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law. I do not mean to disturb the settled construction of the statute, that in order to take a contract for the sale of goods of this value out of it there must either be a part delivery of

the thing, or a part payment of the consideration, or the agreement must be reduced to writing in the manner therein specified. But I am not satisfied in this case, that the jury have not done rightly in finding the fact of a delivery. Where goods are ponderous, and incapable as here of being handed over from one to another, there need not be an actual delivery: but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property⁽¹⁾⁽²⁾. Now here the defendant dealt with this commodity afterwards as if it were in his actual possession: for he sold part of it to another person. Therefore, as upon the whole justice has been done, the verdict ought to stand.

The other Judges agreed that there was sufficient evidence of a delivery to and acceptance by the defendant to leave to the jury. Rule discharged.

Wade qui tam v. Wilson.

1 East, 195. Jan. 29, 1801.

Upon a contract to forbear 600*l.* for a year, reserving interest at the rate of 5 *per cent.*, for which a premium was paid in the first instance, the usury is complete upon the lender's receiving any part of the growing interest within the year. The contract may be laid as for a forbearance to *A.* alone, who was the real debtor, although *B.* had joined with him in the security given to the lender. If *A.* be indebted to *B.*, and *B.* to *C.*, and *C.* agree for an usurious consideration to accept *A.* for his debtor instead of *B.*, this may be laid to be an usurious loan of so much from *C.* to *A.*

THIS was an action of debt for penalties on the stat. 12 Ann. st. 2. c. 16, for taking more than legal interest for the loan of money. The 8th count, on which alone the verdict was taken for the plaintiff, stated that the defendant after the 29th September 1714, to wit, on the 4th of April 1798, at *Thrisk* in the county of *York*, did lend to one *C. Goulton* the sum of 600*l.*, to be repaid by the said *C. G.* to the defendant at the expiration of one year then next following, for the forbearance of which said last-mentioned sum of 600*l.* for that time it was then and there agreed by and between the said *C. G.* and the defendant, that the defendant should be paid interest at the rate of 5*l.* for the forbearing of 100*l.* for a year over and besides the premium hereafter mentioned of ten guineas; and the defendant after the said 29th September 1714, to wit, on the 4th of April 1798, at, &c. corruptly took, accepted, and received of the said *C. G.* the sum of ten guineas as and by way of a premium for the said loan and forbearance of the last-mentioned 600*l.* for the time in that behalf aforesaid, and afterwards, to wit, on 12th October 1798, at, &c. corruptly took, accepted, and received of the said *C. G.* the further sum of 15*l.* for the forbearing of the last-mentioned sum of 600*l.* from the said time of lending thereof until the 4th of October in that year, and as and by way of interest for that sum for that time; and the plaintiff further says, that the defendant by taking, accepting, and receiving the said last mentioned sums of ten guineas and 15*l.* as aforesaid, and for the cause in that behalf aforesaid, corruptly took, accepted, and received of the said *C. G.* for the forbearing of the said last-mentioned 600*l.* from the said time of the said lending thereof until the

(1) Vide *Searle & al. v. Keeses*, 2 Esp. 598. *Hodgson v. Le Bret*, 1 Campb. 288. *Anderson v. Scott*, 1 Campb. 235. n. *Elmore v. Stone*, 1 Taun. 458. *Bailey & al. v. Ogden*, 3 Johns. Rep. 399. 420, 1. Editor's note to *Egerton v. Matthews*, 6 East, 308. § Caines, 184, n. (2nd edit.)

(2) [See also, to the same point, *Jewett v. Warren*, 12 Mass. 300. *Rice v. Austin*, 17 do. 197. *Parks v. Hall*, 2 Pick. 206. *Smyth v. Craig*, 3 W. & S. 14.

As to a sale by one partner to another, of partnership goods, see *Shurilleff v. Willard*, 19 Pick. 202, the kind of delivery required in such a case, being rather the surrender of the possession and control of the goods, than the actual tradition of them by the seller to the purchaser.—W.]

said 4th of *October* in the year last aforesaid, more than at the rate of *5l.* for the forbearing of *100l.* for a year, contrary to the form of the statute, whereby, &c. To this there was a plea of the general issue.

At the trial at the last assizes at *York* before *Chambre*, B. the facts, so far as they relate to the usury alleged in the 8th count, were shortly these. *Goulton*, therein mentioned, owed one *Flintoft* *600l.* on bond, and *Flintoft* and his son were indebted to the defendant in *1200l.* on their promissory note. *Flintoft* not being able to pay the defendant more than half of his debt on account of *Goulton's* default to him, it was agreed between the respective parties at a meeting held for the purpose at *Easingwold* on the 4th of *April*, 1798, that the defendant should accept *Goulton* and another person of the name of *Yates* by way of surety for him as his (the defendant's) debtors for the remaining *600l.* instead of *Flintoft*; the defendant however saying, that he would only lend *Goulton* the money for one year, which was agreed to. Accordingly *Goulton* and *Yates* gave their promissory note of that date, whereby they jointly and separately promised to pay the defendant or order *600l.* on demand for value received, with interest after the rate of *5l. per cent. per annum*; and the defendant at the same time received from *Goulton* ten guineas by way of premium. *Flintoft* however, having omitted to bring *Goulton's* bond with him, it was agreed that the old securities should be delivered up the next day, at *Thrisk*, at which time and place *Goulton's* bond to *Flintoft* and *Flintoft's* note for the original debt of *1200l.* to the defendant, were respectively delivered up and cancelled. On the 12th of *October* following, the defendant received *15l.* for half a year's interest on *Goulton's* note; and at the end of the twelvemonth, received the other half year's interest. The action was commenced as of the 6th of *November* 1798.

It was objected principally, that the loan being for a year, and the premium paid for that time, the usury was not complete till the end of the year when the whole interest was received in addition to the premium. But the learned Judge over-ruled the objection, being of opinion that as soon as the defendant received interest at five *per cent.* for the first half year in addition to the premium, a moiety of which at least was applicable to that half year, he had received more than after the rate of legal interest for half a year, and consequently that the offence was then complete. It was next objected, that the case proved did not apply to the count; that there was no loan of money, as stated, none having been paid to or received by *Goulton*; and that the making himself the debtor instead of *Flintoft*, and giving his own note for the money, did not constitute a loan, though it might have been laid as a corrupt contract: or if it did constitute a loan, it was not such to *Goulton* alone, but to him and *Yates* who joined in the security. And it was further objected that the loan was improperly stated to be on the 4th of *April* 1798, the time when the agreement was made, and the note given by *Goulton* and *Yates* to the defendant, for that they did not take effect till the next day, the 5th, when the original security given by the *Flintofts* for *1200l.* and the security given by *Goulton* to *Flintoft* were cancelled. The learned Judge, however, was of opinion that a loan to *Goulton* was sufficiently proved; that *Yates* was merely a surety for the payment of the money; and that the contract took effect from the 4th of *April*, the time when it was made, and was not suspended till the next day, the only reason for not cancelling the other securities on the 4th being the neglect of the parties to bring them to the place. Accordingly the jury (by the advice of the Court) found a verdict for the plaintiff on the 8th count, being the count best adapted to proof.

These objections were urged again upon a rule to shew cause why there should not be a new trial; against which

Holroyd, was now to have shewn cause in support of the verdict; but the Court desired to hear the counsel on the other side.

Law and *Wood* in support of the rule. 1st, The usurious contract laid is

for a loan of money from the defendant to *Goulton*; but it was not a money transaction; it was a mere substitution of one debtor for another, of *Goulton* for *Flintoft*. *2dly*, If it were a loan of money by construction of law, at any rate it did not become such till the exchange of the securities, which was not till the 5th of *April*, whereas it is laid that the usurious interest was taken for forbearance from the 4th. Till the actual exchange took place, the original debts from *Goulton* to *Flintoft*, and from *Flintoft* to the defendant continued in force; for it was not in the contemplation of the parties that *Goulton* and *Flintoft* should both be indebted to the defendant for the same loan at the same time. Therefore, though *Goulton's* note was given to the defendant on the 4th, yet it was not to take effect till the other securities were given up in lieu of which it was received. *3dly*, Supposing it to be a loan, which was to commence on the 4th of *April*, yet the contract to forbear being laid to be for a year, till that time was expired there was a *locus penitentiae*, and the usury was not complete. The premium was entire, and is alleged to have been received for the whole year; then it could not be apportioned, and part of it tacked to the half year's interest. The money received including the premium is less than legal interest for the whole year on the sum advanced: under such an agreement the usury could not be complete till more than 30*l.* had been received. In *Fisher q. t. v. Beasley*, Dougl. 235, a premium was taken in the first instance for the forbearance of a loan for six months, reserving interest; Lord *Mansfield* nonsuited the plaintiff at the trial, conceiving that the usury was complete on the taking of the premium, and that the time for bringing the action was elapsed; but the Court afterwards held, that the usury was not complete till the half year's interest was received, which together with the premium amounted to more than 5 per cent. There the interest was reserved at the end of the half year, but here the interest was reserved yearly; therefore, upon the same principle the usury was not committed till the whole year's interest had been received, amounting together with the premium to more than lawful interest. *4thly*, The security was given by *Yates* and *Goulton* jointly as well as severally; the contract therefore was to forbear to both, and a forbearance by the defendant to one only would not have been a compliance with it. Then the proof does not sustain the count, which lays it to be a contract to forbear to one only.

Lord KENYON, C. J. There is no weight in any of the objections. This was in substance a loan of money from the defendant to *Goulton*, although the ceremony of handing the money over from the one to the other did not take place. But the loan originally advanced to *Flintoft* was by agreement transferred to *Goulton*. This transaction took place on the 4th of *April*, when the note was given, and on that day it was agreed that the old securities should be given up, though it was not actually done till the next day, the parties not having them ready at the place. The objection proceeds upon an assumption of fact not well founded. The case of *Fisher q. t. v. Beasley* does not apply; for there the only question was, Whether the usury were complete before the party had received any interest at all, the amount of the premium being within the legal rate of interest. But here the party having ten guineas premium in hand, and interest accruing from day to day, actually received interest *qua* interest for half a year, which made what he received upon the whole amount to more than lawful interest for that time upon the sum lent. It is impossible upon this statement not to say that the usury was complete when the half year's interest was received. And this agrees with the charge, which is, that by taking the premium of ten guineas for the loan in the first instance, and by afterwards taking 15*l.* for the forbearing of 600*l.* from the 4th of *April* to the 4th of *October*, the defendant corruptly took more than at the rate of five per cent., which is an undeniable conclusion, and according to the real fact.

GRÖSE, J. declared himself of the same opinion.

LAWRENCE, J. The argument is, that the contract being for forbearance of the principal for a year, and interest being reserved yearly, therefore there could be no usury committed till the end of the year; and it is supposed that the case of *Fisher v. Beasley* is an authority for that position. But that is not the case here; for the contract is stated to be for the forbearance of the loan for a year, with interest to be paid *at the rate of 5 per cent.*; it is not stated that the defendant was to wait for his interest till the end of the year; but it was to accrue, as by law it does, *de die in diem*. Therefore, after the receipt of the premium as soon as any interest as such was paid on the loan, though but for a day, it would constitute usury. The parties themselves did not consider that interest was not due till the end of the year; for it was actually paid by the one and received by the other at the end of the first half year without objection. Here then is a premium paid of ten guineas at first, which was to run through the whole year, and interest accruing daily on the principal sum, the defendant actually received interest for the first half year, which together with what he had before received by way of premium amounts to more than legal interest. That immediately constituted usury. As to the contract being to forbear to both *Goulton* and *Yates*, that is not strictly so; the contract was to forbear to *Goulton* only, though *Yates* was required to join in the note by way of security.

LE BLANC, J. This must certainly be taken to be a loan of money from the defendant to *Goulton* on the 4th of *April*; for *Goulton* being indebted to *Flintoft*, and this latter to the defendant for money before advanced, it was on that day agreed that the defendant should accept *Goulton* as his debtor in satisfaction of so much money as *Flintoft* owed him; for which purpose *Goulton* was to give the defendant a new security, and the old ones were to be cancelled. *Goulton* accordingly gave his note for the amount: and from that day interest ceased to run upon the old securities, and they would then have been delivered up but for the accident of their having been left behind. Then the premium was given upon an agreement to forbear from the 4th of *April* the sum of 600*l.* with interest *at the rate of 6*l.* per cent.* And it is next objected, that the premium is not to be apportioned to any part of the growing interest, because it is said that it did not accrue till the end of the year; and yet the defendant received it as growing interest at the end of the first half year. But I am of opinion that at least one moiety of the premium is to be apportioned to the half year's interest which was received; and that the true spirit of the agreement was, that the premium was to run through the whole year in proportion as the interest accrued: and therefore, upon the whole, I think the contract proved sustains the count; and that the usury was complete when the first half year's interest was paid(1). Rule discharged(a).

Rawson and Others v. Johnson.

1 East, 203. Jan. 31, 1801.

In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt and to pay for it according to the terms of the sale, but that the defendant refused to deliver it, without averring an actual tender of the price.

THIS was an action on the case, to recover damages for the breach of a

(1) Vide *Lawrence v. Knies*, 10 Johns. Rep. 140.

(a) Vide *Lloyd qui tam v. Williams*, 3 Wils. 250. More than legal interest being taken in advance for a certain time, the usury was holden to be complete on the receipt of the money, and not at the expiration of the time for which the forbearance was agreed to be.

contract, whereby the defendant undertook to sell and deliver to the plaintiffs a certain quantity of malt at a given price. This was laid differently in different counts, and at the trial at the last assizes at *York* the plaintiff obtained a verdict, which was entered generally on all the counts. The two first counts, in which was averred a part delivery of the malt, were admitted to be good; but a rule was obtained calling on the plaintiffs to shew cause why the judgment should not be arrested for the defect of the third count, in only averring a readiness and willingness in the plaintiffs to pay for the malt, and not averring the actual tender of the price agreed upon. The count in question was as follows:

And whereas also afterwards, to wit, on the 12th of *November* 1799, to wit, at *Leeds* in the county of *York*, in consideration that the plaintiffs, at the instance and request of the defendant had then and there bought of the defendant a certain large quantity (to wit) 100 quarters of malt, at and for a certain price then and there agreed upon between them, he the defendant undertook and then and there faithfully promised the plaintiffs well and truly to deliver to them the said 100 quarters of malt whenever he the defendant should be thereunto afterwards requested; and the plaintiffs in fact say, that although the defendant afterwards, to wit, on, &c. at, &c. requested the defendant to deliver to them the said last-mentioned 100 quarters of malt, and were then and there *ready and willing to pay the said defendant for the same*, according to the terms of the said sale, and although the plaintiffs were then and there *ready and willing and offered to accept and receive* the said last-mentioned 100 quarters of malt of and from the said defendant, yet the defendant, not regarding his said last-mentioned promise, &c. did not, when he was requested as aforesaid, or at any other time before or since, deliver to the plaintiffs the said last-mentioned 100 quarters of malt, or any part thereof, but hath hitherto wholly refused and still doth refuse, whereby, &c.

Law and *Lambe*, shewed cause against the rule. The two first counts are out of the question, because there being an averment of a part-delivery of the malt without payment, and the contract stated being entire, the defendant is precluded from saying that such a delivery of the rest ought not to have been made, or that the payment was a condition precedent. As to the third count, the averment that the plaintiffs were *ready* to pay the defendant is sufficient; and distinguishes this from the case of *Morton v. Lamb*, 7 Term Rep. 125, where the opinion of the Court turned upon the want of such an averment. A *readiness* to pay implies an ability as well as a willingness to do the act; and it could only be satisfied in proof by shewing that the plaintiffs had the money by them to pay for the malt if the defendant had been ready to deliver it. The case cited was stronger than the present, because there a particular time was fixed, so that a formal tender might more easily have been made; but even there some of the Judges thought that an averment of this sort would have done; whereas here no time being mentioned, a performance of the contract by the defendant within any reasonable time would have been sufficient; and a tender by the plaintiffs could not be necessary till the defendant might be expected to be ready to do the act(a). It is not required in all cases to make an actual tender, where from the nature of the thing it would be nugatory. In *Merrit v. Rane*, 1 Stra. 458, which was finally decided in the House of Lords, the agreement was, that in consideration of 250*l.* paid to the defendant he was to transfer certain stock to the plaintiff before a certain day, within three days after demand in writing, upon payment of the further sum of 9000*l.* The plaintiff averred, that he appointed one *J. M.* to demand the stock and pay the price, that the defendant was required by note in writing to transfer the stock on a certain day, when *J. M.* attended all the while, the books were open, but that the defendant did not appear to transfer, &c. It was objected

(a) Vide *Ferrand v. Pearson*, E. 2 Geo. 1. C. B. Bull. N. Pri. 156.

(*inter alia*) that the plaintiff should have shewn that he had the money there to have paid on the transfer; but Lord C. J. *Pratt* said, "the payment of the money is no condition precedent, but a concurrent act; and if the defendant had been there the plaintiff must have laid down his money, though not so as to part with it till the transfer." And the Court afterwards said, "as to the plaintiff's not shewing a tender, we think that ought to come from the defendant by way of excuse, that he was there ready to have transferred if the plaintiff had been there to have paid the money." The ground, therefore, of the determination was, that as the actual performance of the act was disappointed by the party's non-appearance, such performance in fact was unnecessary. So here, it being uncertain when the defendant would be ready to deliver the malt, it could not be necessary that the plaintiffs should carry the money constantly with them. Besides, it is averred that the defendant refused to deliver the malt, and a refusal to deliver generally where no time is fixed for the delivery is a renunciation of the contract, and dispenses with a tender. All the cases cited in *Morton v. Lamb*, in support of the necessity of a strict averment of a tender, were cases upon demurrer, except the case of *Callonel v. Briggs*, Salk. 113, which was only a *nisi prius* decision. But this being after verdict, every thing will be intended that was necessary to support the facts laid in the declaration; and therefore it must now be presumed, either that the plaintiffs were prepared to have paid the money on the spot if the defendant had been ready to deliver the malt, or that he refused to do so, in which case no tender was necessary. If a party say he will not receive the money, that has been ruled to dispense with the necessity of a tender. So here a general refusal to deliver the malt is the same in effect. The objection to the sufficiency of this averment may be resolved into this, that the defendant had a right to require the plaintiff's money to be paid to him first, and then he might determine whether or not to deliver the malt. In covenant for non-payment of rent it is sufficient to aver that the tenant was on the land the last day *ready to pay*, but that nobody was there to receive it on the part of the landlord; but there never is any averment in such case that he *tendered* it.

Holroyd, contra. Where mutual acts are to be done, one party cannot maintain an action against the other for non-performance without averring either an actual performance, or a direct tender or offer to perform his own part. The case of *Morton v. Lamb* only decided that a declaration without such an averment was bad: and *Lawrence*, J. there said, that the plaintiff must either aver performance or a tender; and that is the result of all the cases collected in the report of that case. It was expressly so decided by Lord *Holt* in *Callonel v. Briggs*, Salk. 113, and also in *Thorpe v. Thorpe*, Ib. 171, *Kingston v. Preston*, Dougl. 688, and *Goodison v. Nunn*, 4 Term Rep. 761. It is not enough to be ready and willing to pay, unless that be made known to the other party; this may be done without actually parting with the money, which is not necessary, according to what was said in *Merrit v. Rane*, unless the defendant had been ready to have delivered the malt at the same time; but such a readiness amounts to a tender, and ought to be so pleaded. It is different, as in that case, where an act is to be done at a particular time and place; there if the party does not attend a tender is impossible, and therefore not necessary to be shewn; but such non-attendance must be pleaded in order to excuse the necessity of the tender.

Lord KENYON, C. J. However technical rules are to be attended to, and in some cases cannot be dispensed with, yet in administering justice we must not lose sight of common sense: and the common sense of this case will not be found to militate against any rule of law. No doubt can be entertained how this case should be decided; one man agrees to do a certain act in consideration of another man doing another act; the acts are to be done at the same time and place; one of the parties goes there intending to do his part, and the other

stays away altogether; the former is obliged to bring his action for this breach of the agreement, and he pleads according to the truth of the fact, that he was at the time and place appointed ready to have received the other's goods and to have paid the stipulated price for them, which is all that he was bound to do, and that nobody was there on the part of the defendant, or that the goods were not there ready to be delivered: would it be any answer to say that he ought to have pleaded a tender of the money? Now this case is the same in effect: the defendant undertook to deliver the malt when he should be requested, and the plaintiffs plead that they made the request to him, and were ready and willing to have accepted and paid for it, but that he did not deliver it when requested, or at any other time, but refused so to do. To be sure, under this averment the plaintiffs must have proved that they were prepared to tender and pay the money if the defendant had been ready to have received it, and to have delivered the goods: but it cannot be necessary in order to entitle them to maintain their action, that they should have gone through the useless ceremony of laying the money down in order to take it up again. It would be repugnant to common sense to require it. It is reported in the case of *Morton v. Lamb*, that I said that the plaintiff should have averred a performance or a *readiness to perform* his part of the contract; I do not doubt that I said so, and I still think it was rightly said: and if so, it would decide this case. However, if it were necessary I see no reason why we should not avail ourselves of another argument urged at the bar, namely, that this is after verdict, when every thing may be presumed to have been proved which was necessary to sustain the declaration. It is true, that a verdict will not cure a defective case; but it will cure a case defectively stated.

GROSE, J. The doctrine in question was much discussed in the case of *Morton v. Lamb*; and we there held, that where mutual acts are to be performed, the plaintiff, in order to maintain his action for the non-performance by the other party, must shew that he was ready to do whatever was required to be done by himself. And I have lying before me the ground of objection that was made in arrest of judgment in that case, namely, that the plaintiff had not averred "that he had tendered to the defendant the price of the corn, *or was ready to have paid for it on delivery*;" and the Court afterwards adopted the suggestion, and considered that an averment of a *readiness to pay* would have been sufficient as well as an actual tender. Now this averment I consider under the circumstances as tantamount to a tender of the money; for the plaintiffs say they were ready to pay for the malt, but the defendant refused to deliver it. If these parties had met for the purpose of settling the business, and the plaintiffs had expressed their readiness to pay the price agreed on, upon delivery of the malt, but the defendant had not got the malt there to deliver to them, there could have been no necessity for the plaintiffs to make a tender of the money, because they were not bound to part with it until the defendant was ready to deliver them the malt. Therefore, I do not think that this is a defective averment, but that it was sufficient under the circumstances to aver a readiness to pay.

LAWRENCE, J. The rule in this case was moved for on the authority of *Morton v. Lamb*; the ground of that determination was, that where a man had agreed for a certain price to deliver corn to another at a certain place within a month, the payment of the money and the delivery of the corn were concurrent acts to be performed at the same time; and that it was not sufficient to enable the plaintiff to maintain an action for damages for the non-delivery of the corn to aver merely that he was ready and willing to receive it. But the Court did not hold it necessary in such a case that the plaintiff should part with his money into the other's hands, and then endeavour to get the corn as he could. I alluded there to some cases in order to shew that the plaintiff must state in his declaration that he was ready to do every thing that was required on his part to be done; but I did not mean to say, nor was the atten-

tion of the Court called to it, that that averment was to be made in any particular form. In the case before the Court there was no averment whatever of the kind. It is urged that this is after verdict, and that it is sufficient that there is an allegation of the fact of a readiness to do that which was required of the plaintiff; and to be sure, if it were necessary to resort to that, so much strictness in the manner of pleading a fact is not necessary after verdict as on demurrer. But since this rule was obtained I have looked more particularly into the precedents to see in what manner averments of this sort have been made; and I have found one in particular in *Plowd. 190*, on which probably the pleader who drew this declaration had his eye. The case is that of *Norwood v. Norwood and Read*, executors of *Gray*; wherein the plaintiff declares, that in consideration that he had paid the testator in his lifetime 40*s.* he promised to deliver to the plaintiff at *Ramsgate* 60 quarters of wheat in certain proportions and for a given price to be paid immediately after the delivery of the same. The declaration then avers, that *Gray*, though often requested to deliver the corn, and though the plaintiff at the several times aforesaid when the wheat should have been delivered was ready at *Ramsgate* to receive it, and to pay to *Gray* the several sums which he ought to pay immediately after the said receipts of the wheat, hath not delivered, but the same to deliver to the plaintiff hath wholly refused, &c. And upon demurrer the plaintiff had judgment. There indeed the only question made was, how far the executors were liable? but it was never questioned but that supposing they were liable, the form of the declaration was good. There are similar precedents to be found in *Hearne's Pleader*, 131, and in *Clift. 97*. It appears, therefore, upon the whole, that this form of declaration agrees with the current of authorities; that it is not impeached by the case of *Morton v. Lamb*, on the authority of which the question was brought forward; and that it is warranted by the precedents I have quoted.

LE BLANC, J. According to the cases which have been determined on this question neither of the parties was bound to do the first act, or to perform his part of the agreement before the other. If so, then neither can be bound to state that in pleading which is equivalent to performance. Now a tender and refusal has always been deemed to be equivalent to performance; therefore, as performance in this case was not necessary, neither was it necessary to aver that which was equivalent to it. But all that is required of the plaintiffs to shew is, that they did everything which they were bound in fact to do. Then if they shew that they were ready to pay the price, provided the defendant were ready to deliver the malt, that is all that was necessary for them to do: and consequently, their pleading a readiness to perform is equivalent to every thing that they were bound to perform wherethe defendant refused to perform his part. Therefore, I consider this averment sufficient; and that it must be taken after verdict that they had the money ready to have paid it, if the defendant had been ready to perform his part.

Rule discharged(1).

Taylor v. Eastwood.

1 East, 212. Jan. 31, 1801.

In trespass for taking and driving the plaintiff's cattle, to which there was a justification that the defendant was lawfully possessed of a certain close, and that he took the cattle there damage feasant, the plaintiff may specially reply title in another, by whose command he entered, &c., and it does not vitiate the replication that it unnecessarily proceeded farther to give colour to the defendant.

TRESPASS for chasing the plaintiff's cattle and driving them from their

(1) Vide *Waterhouse v. Skinner*, 2 Bos. & Pul. 447. *Martin v. Smith*, 6 East, 555. *West v. Emmons*, 5 Johns. Rep. 179. *Miller v. Drake*, 1 Caines, 45.

feed, and another count for seizing and driving them away. Pleas, 1st, Not guilty. 2d, That the defendant was seised in fee of a close called *the Croft*, situate in the parish of *Huddersfield* in the county of *York*, and because the plaintiff's cattle were damage feasant there he justifies driving them out. 3d, That before and at the time when, &c., the defendant was, and still is, *lawfully possessed* of and in a certain other close called *the Croft*, situate, &c. and then justifies for the like cause as before. Replication to the first special plea, *de injuria sua propria absque*, &c. traversing the defendant's seisin in fee. Replication to the last plea, that before the said time when, &c. and before the said defendant any thing had or claimed to have in the said close called *the Croft*, one *Ann F.* now deceased was seised in fee of the said close, and being so seised, afterwards intermarried with one *T. M.*, by virtue whereof the said *T. M.* and *Ann* became seised in fee of the said close, &c. and afterwards had issue one *A. F. M.* That *Ann* (the wife) afterwards, and before the said time when, &c. to wit, on, &c. died seised, leaving the said *A. F. M.* her son and heir, and the said *T. M.* her surviving, upon the death of which said *Ann* the said *T. M.* became and was seised of the said close in which, &c. in his demesne as of freehold for his life as tenant thereof by the curtesy, and being so seised thereof, he the said plaintiff a little before the said time when, &c. to wit, on, &c. as servant of the said *T. M.* and by his command, and for his use, entered into the said close in which, &c. and put therein the said cattle, &c., and the same cattle remained and continued therein until the said defendant afterwards, to wit, on, &c. claiming title to the said close in which, &c. under colour of a certain charter of demise made to him thereof by the said *T. M.* before the said time when, &c. (whereas nothing in the said close in which, &c. passed to the said defendant by virtue of the said charter of demise,) of his own wrong at the said time when, &c. chased, &c. the said cattle in manner and form, &c. and this he is ready to verify, &c. and then the plaintiff new assigns other trespasses. Rejoinder, *de injuria*, &c. and traversing the seisin of *A. F.*; and as to the trespasses new assigned, not guilty. The issues being all found for the plaintiff, a motion was made last term in arrest of judgment, because the replication to the second plea was no answer to it, and was in itself informal.

Law and *Lambe*, in shewing cause against the rule, admitted that the replication to the second plea was more circuitous than it need have been, and that the common replication *de injuria sua propria*, &c. would have been sufficient; but they contended that this was tantamount to it. The question is, Whether when possession is set up as a defence to an action of trespass for chasing the plaintiff's cattle, the plaintiff can by pleading shew a title in another person, and justify entering for his use? It cannot be doubted that the facts stated in the replication might be shewn in evidence under the common replication. The distinction was taken in an anonymous case in *Salk.* 642. *Easter, 8 Anne*, by *Holt, C. J.*, that in transitory actions possession *prima facie* imports a good title; but in trespass *quare clausum fregit* it is otherwise (a): *for there the plaintiff claims the close, and the right may be contested.* Now here the defendant by his plea brings into question the right to the close: and it was competent to the plaintiff in answer to the plea of lawful possession in the defendant to shew a title in another and a right of entry for his use. Where one is seised in fee an entry for his use vests the possession immediately in him. *Bro. Abr. Seisin*, pl. 50. It seems to have been taken for granted in *Searl v. Bunnion*, 2 *Mod.* 70, that this might be pleaded specially. That was trespass for taking the plaintiff's cattle, to which the defendant pleaded that he was possessed of the close for a term of years then to come, and so justified taking them damage feasant: the plaintiff demurred, because the defendant had not shewn the commencement of his title. The Court held

(a) Vide *Pell v. Garlick*, 2 *Lutw.* 1489.

the plea good upon this distinction; that where the matter is collateral to the title of the land, and for aught appearing in the declaration, the title may not come in question, there such a justification as that will be good. But in effect they admit that title might be replied, for they proceed to say, "In this case no man can tell *what the plaintiff will reply*;" which shews that in the judgment of the Court the plaintiff might have replied specially. If the defendant could have denied any part of the title set forth, and shewed that he had a right to the possession, he might have done so: instead of which he takes issue on *A. F.*'s title which is found against him; by which he admits that his entry was only under the colour assigned. It is true, that colour was not necessary to be given here, for it is only required where otherwise the plea would amount to the general issue, in order to withdraw it from the judgment of the jury, and submit it as a question of law to the court^(a): but that will not vitiate the replication. It only alleges, that the defendant entered under colour of a charter of demise, which conferred no title on him, but it does not allege that he was in possession. On the whole, if the facts stated in the replication be true, it is impossible that there can be a lawful possession in the defendant; for the plaintiff entering for the use of one who had title, cannot be dispossessed of his lawful possession by the tortious entry of a stranger: and therefore the replication is a full answer to the plea.

Littledale in support of the rule. The case cited from *Salk.* 642, is in favour of the defendant; for Lord *Holt* there said, "Where the action is transitory, as trespass for taking the goods, the plaintiff is foreclosed to pretend a right to the place, nor can it be contested on the evidence who had the right;" though it was otherwise in trespass *quare clausum fregit*. There the declaration and plea were the same as here. Such a replication as the present is new at least, and it is admitted that the common replication *de injuria, &c.* would have been more proper, for that would have put in issue both the title and right of possession. However, admitting that there may be a special replication shewing a title in another, and an entry under him in answer to a plea of lawful possession in the defendant, it may still be objected here that the replication does not shew any right to the possession incompatible with what is stated in the plea; for the title may be in one person and the right of possession in another: the replication should have gone on and stated that the party entitled entered *and was in possession*, and then that the defendant afterwards entered under colour, &c.; as was done in *Taunton v. Coster*, 7 Term Rep. 431, where the bare possession only being put in issue, the Court held that the party who entered under a lawful title could not be treated as a trespasser. But this is an attempt to make one a trespasser who had a lawful possession, and who justifies it against an entry made upon him.

Lord KENYON, C. J. The case in *Salkeld*, which is the only authority cited in support of the objection to this replication, does not come very strongly recommended. For first, it is an anonymous case; and next, what is relied upon as there said was beside the point in judgment. It was rightly decided, that as against a wrong-doer the defendant might justify upon his possession, which was admitted by the demurrer; but Lord *Holt* is made further to say, that which cannot be admitted, that where the action is transitory, as in that case, for taking the cattle, the plaintiff is foreclosed from pretending a right to the place, and it cannot be contested on the evidence who had the right. What is the good sense of the case? The plaintiff brings an action for an injury done to him in driving away his cattle from the place where they are depastured. The defendant justifies taking them damage feasant in a certain close, of which he states himself to be lawfully possessed. The plaintiff replies, that he has a right to the possession, because such an one has a title to the land, and that he entered as his servant. The defendant denies the title

(a) Vide *Argent v. Durrant*, 8 Term Rep. 406.

of that person which is found against him. Then the title being in another from whom the plaintiff claims, it was incumbent on the defendant to shew how he had a lawful possession, and that he was not a mere wrong-doer. That he has failed to do, and therefore there is no answer to the action. Possession alone may be pleaded against a wrong-doer; but I cannot conceive how it can avail against the person who has the title to the present possession.

GROSE, J. The motion in arrest of judgment was grounded upon the authority of the case in *Salkeld*, which has been sufficiently answered by my Lord. The use of pleading is to put such material facts on the record as may plainly bring the merits of the case into question. The material question here was, Whether the plaintiff had a right to depasture his cattle in a close? or in other words, Whether the defendant was justified in driving them out? To shew this the defendant first says, that he was seised in fee of the close, which is found against him. Then he says, that he had a right to the possession. To this it is answered, that another person under whom the plaintiff claims was entitled to the land, and that he entered by his authority: issue was taken on the seisin of that person, and that also is found against the defendant: so that both the title and the right of possession is found against the defendant, and consequently his justification fails altogether.

LAWRENCE, J. The objection is strictly this, that the plaintiff has stated that on the record which it was competent to him to have given in evidence under the general replication of *de injuria sua propria*, &c. Now, unless we are bound by authority to admit the validity of such an objection, it ought not to prevail. The only authority relied on for this purpose is the case referred to in *Salkeld*. Until that case, it was *vezata questio* whether a man could justify taking another's cattle damage feasant without shewing a title to the *locus in quo*; and many cases may be cited where that question has been agitated(a). The case however in *Salkeld* settled that it was sufficient for a man to justify upon his possession against a wrong-doer: but it does not go the length of shewing that such a justification is good as against the person who has the title to the land, and who makes an entry in pursuance of that title. It may be observed, that that case came before the Court upon demurrer to the plea, and therefore no question could arise as to whether title could be replied to a plea of possession. One may suppose a case in which it would be proper to reply specially; as if there be two tenants in common, and one bring trespass against the other for taking his cattle, to which the defendant pleads that he took them damage feasant. There it seems that the plaintiff ought to reply specially that he was tenant in common with the defendant, and to shew that he was not a trespasser. And at any rate, what is supposed to have been said by Lord *Holt* in that case cannot be right to the extent of it; for certainly the plaintiff would not be foreclosed from shewing a right to the place. Then it is objected, that the replication proceeds to give colour to the defendant, which it need not have done: but the introduction of unnecessary words of form will not vitiate the rest of the replication, which is good.

LE BLANC, J. We are called upon to deprive the plaintiff of the fruits of his verdict in this case, notwithstanding the title to the land where the cattle were distrained is found for him, and that he entered in pursuance of that title. The only authority which is adduced in support of the rule is the case in *Salkeld*; but that does not go to the extent contended for, that the defendant may justify upon his possession notwithstanding the facts above mentioned found against him. In order to understand that case rightly, we must take the position there laid down by Lord *Holt* with reference to the point before the Court, as it arose upon the pleadings there stated. But it is no authority for a case circumstanced like the present, where the title to the land is found in the plaintiff, and an entry in pursuance of that title.

Rule discharged.

Birkley and Others v. Presgrave.

1 East, 220. Feb. 3, 1801.

An action upon promises lies by a ship owner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern.

IN *assumpsit*, the first count alleged, that the plaintiffs were owners of the ship *Argo*, with the appurtenances, of the value of 675*l.*, whereof G. A. was master, which ship on the 3d of November 1799, was proceeding upon a voyage with a cargo of wheat of the value of 855*l.*; that during the voyage part of the furniture of the ship, of the value of 20*l.* was utterly lost to the plaintiffs, and other part thereof sustained damage to the value of 50*l.*; which loss and damage were occasioned by certain acts of the master and crew of the vessel, properly and necessarily done by them in order to preserve the ship and cargo from perishing by storm. That certain help and assistance were then and there obtained by the master in order to preserve the ship and cargo from so perishing by storm, and were then and there necessary and proper for that purpose, for which the plaintiffs were obliged to pay and did pay 20*l.* That the ship and cargo were, by the means used for the general preservation, thereof, preserved from the storm and completed the said voyage. Of all which premises the defendant afterwards had notice. That the defendant was, during the time the wheat was on board the ship as aforesaid, and at the time of the loss, damage, help, and assistance aforesaid, the owner of the wheat, and was and is benefitted in respect thereof by the acts of the master and crew, and by the said help and assistance; from all which respectively the loss, damage, and expences accrued. By reason whereof, the defendant, as the owner of the wheat, became liable to contribute to the said loss, damage, and expences in a general average; and thereupon in consideration of the premises, the defendant promised to pay the plaintiffs so much money as he, as such owner of the wheat, was liable to contribute to the said loss, damage, and expences in a general average when he should be thereunto afterwards requested. And the plaintiffs averred, that the defendant, as such owner of the wheat, was liable to contribute to the loss, damages and expences, in a general average, the sum of 40*l.* whereof he had afterwards notice. The declaration contained two other counts; the one *indebitatus assumpsit* for money due and payable for a general average; and the other for money paid, laid out, and expended; with the common breach to the whole. The defendant pleaded *non assumpsit*.

This cause came on to be tried at the last assizes for *Durham* before *Graham*, B. when a verdict was found for the plaintiffs, damages 19*l.* 12*s.* subject to arbitration as to the *quantum*, and to the opinions of this Court as to the questions of law upon the following case:

The ship *Argo*, the plaintiffs being her owners, on a voyage from *Wisbeach* to *Sunderland*, laden with wheat shipped by the defendant and of which he was the sole owner, as she was entering *Sunderland* harbour with a fair wind and had just passed the lower end of the North Pier, was by the veering of the wind and a sudden and violent squall prevented from proceeding further into the harbour, and the crew were obliged to let go the small bower anchor in order to bring her up. With the assistance of some men who came to her for that purpose in a pilot-boat they fastened the ship, in order to secure and preserve her and the cargo from the storm, and with a warp which they for that purpose got run out and fastened to the South Pier: but the warp was soon broke by the storm. In order that the anchor might hold, and for the preservation of the ship and cargo, more cable was then borne away,

and the ship was permitted to drive alongside the North Pier, to which they made her fast with hawser ends and towing lines, which were proper ropes, and such as were usually provided and employed for that purpose. The master cut the cable from the best bower anchor that was then upon the ship's bow, being afraid that another ship would be adrift and come down upon the *Argo*, and being apprehensive that there would not be time enough to undo that cable if the other vessel should happen to drive against his ship; and therefore fastened and moored the *Argo* to the pier; and this he did for the preservation of the ship and cargo. Whilst they were so fastening her with the cable, the other ropes (the hawser ends and towing lines) through the violence of the storm, and by another ship driving against the *Argo*, broke; and if there had been another minute's delay in cutting the cable, the ship would have gone adrift and sunk upon the bar at the entrance into the harbour; but she avoided that peril by means of the cutting and using that cable in manner aforesaid. Afterwards the master, for fear the ship should make water and the corn be thereby spoiled, the ship having a hole through her bottom occasioned by another ship running foul of her in the storm, got twelve men to go on board to keep her clear of water, in order that the cargo should not be damaged or spoiled. Half a guinea a-piece was paid by the master for the plaintiffs to those men who went on board for this purpose, they refusing to do so under that sum; and whilst they continued in the ship they were for that purpose employed at the pumps. The damages found by the jury were calculated as the amount of what was payable to the plaintiffs by the defendant, as the owner of the cargo, in respect of the cutting and wear of the cable, the breaking of the warp hawsers and towing ropes, and of the amount of what was paid by the plaintiffs for the services aforesaid to the men who went on board the ship, and of the expence of maintaining them whilst in the ship. The question for the opinion of the Court was, Whether an action can be maintained for the loss, damage, and expences abovementioned, or any, and which of them?

Holroyd for the plaintiff. Two questions arise on this case; 1. Whether any and which of the losses are within general average? 2. Whether the owner of the ship can recover a contribution from the owner of the cargo for his proportion of expence incurred for the general concern?—1. Admitting that the hawser ends and towing lines which were broken by the storm are not such a loss as falls within the meaning of general average, because they were only applied to the ordinary purposes for which such things are provided; yet the cable which was cut and sacrificed for the purpose of aiding the others, and thereby appropriated to a different use from what it was originally intended for, and which contributed to the preservation of the ship and cargo, does constitute a charge of general average. So does the money paid to the men who came to the vessel in the pilot boat, which was for the preservation of the whole concern. In *Dacosta v. Newnham*, 2 Term Rep. 407, where a ship was obliged to put into port for the benefit of the whole concern, charges which were incurred there for taking care of the cargo, and even provisions for the workmen hired for the repairs of the ship, were deemed general average. Now, the above-mentioned expences were equally for the benefit of the whole concern in consequence of the storm. And in *Beawes's Lex. Merc.* 148, the rule is laid down, that whatever expences and losses are voluntarily incurred for the general preservation of the ship and cargo are general average^(a). But at any rate, there is one article of expence which was incurred solely on account of the cargo, and for which the defendant is solely liable, and that is the amount of what was paid to the men who were employed at

(a) So, in the same book, folio edition, 148. "In settling a gross average an estimate must be made of all the goods lost and saved, as well as of what the master shall have sacrificed of the ship's appurtenances to her preservation and that of the cargo."

the pumps on board the ship in order to prevent the water from damaging the wheat. 2. This action is maintainable for the defendant's proportion of the general average. It is enough to say, that such actions have been maintained and verdicts recovered without objection. They fall within the general principle of law, that where any person is bound to make contribution to another the law implies a promise that he will do so; in other words, it is a good consideration for an implied promise. At the common law, where contribution was required a writ of contribution issued, precedents of which are to be found in Fitzh. Na. Br. 2d edit. 378. This has fallen into disuse, because in most instances as many persons were concerned a more easy remedy was administered in equity. Bro. Abr. tit. *Suit and Contribution*, gives several instances where contribution shall be made. So if one surety pay more than his proportion of the debt of the principal he may recover from another the overplus. It may be said, that in some cases there will be a difficulty of ascertaining the *quantum* of contribution in these cases, as where many have an interest in the cargo: But at any rate, that difficulty does not exist in this case; and where it is too great to be unravelled at law, recourse must be had to a court of equity. In *Dacosta v. Newnham* before mentioned, which was an action against an underwriter, one of the questions which arose was on the *quantum* of the sum to be recovered, whether certain items constituted general average or not? for if they did, he was only liable to pay a proportion; and the Court there entered into the consideration of the *quantum*. Here the loss being under 20*l*. The plaintiffs could not have any remedy in equity by reason of the smallness of the demand. At any rate, however, the pay of the twelve men employed for the benefit of the cargo to prevent its being damaged by the water coming in may be recovered under the count for money paid.

Hullock, for the defendant, contended, first, that the action was not maintainable. The circumstance of there being no instance produced of such an action being maintained where the attention of the Court was expressly called to the question is itself a strong argument against it according to *Ashurst, J.* in *Le Caux v. Eden*, Dougl. 601. There is also a good reason why the remedy should be in equity and not at law, in order to prevent a multiplicity of actions: what the interest of each individual was in the cargo could only be ascertained upon a bill filed for a discovery. 2. At any rate, none of the losses incurred fall within general average, being the immediate effects of the storm. In the passage quoted from Beawes's *Lex Merc.* 148, one of the circumstances stated to be essential to concur to make losses of this sort general average is, that the sacrifice of the ship's furniture should be in consequence of a consultation between the captain, his officers, and crew. Now here the loss was incurred by the sole orders of the master, without any deliberation of the crew, and therefore is a case for which the books do not provide. And there seems reasonable ground for this precaution, in order to prevent fraud.

Lord KENYON, C. J. If the law confer a right, it will also confer a remedy. When once the existence of the right is established, the Court will adapt a suitable remedy, except under particular circumstances where there are no legal grounds to proceed upon. Here the only difficulty pretended is the ascertainment of the proportion to be paid of the general loss in each particular case; and since it is admitted, that this may be ascertained in equity, there seems to be no reason why if it can be ascertained without recourse to equity, an action should not lie to recover it at law. But it is objected, that this will lead to a multiplicity of actions. The same difficulty, however, must occur in equity. It is not competent in general to file a bill which will conclude the interests of persons not named. There are indeed some excepted cases to that rule; as in the instance of creditors, one of whom may file a bill for himself and the rest of the creditors, seeking an account of the estate of their de-

ceased debtor for payment of their demands(a). But generally speaking, a court of equity will not take cognizance of distinct and separate claims of different persons in one suit, though standing in the same relative situation. I have known the attempt sometimes made, where an estate has been contracted to be sold in parcels to many different persons, to file a bill in the names of all of them to compel a specific performance; which has been constantly refused. Bills in equity for a discovery are for the most part auxiliary to proceedings in a court of law: and it does not follow that a court of equity has jurisdiction over the subject matter because it would compel a discovery. Such a proceeding does not change the nature of the jurisdiction over the original matter. The objection, therefore, arising from multiplicity of actions, is of no weight in a case like the present. The same inconvenience would exist if there were many persons owners of different parts of a cargo, and an injury were to happen to the whole from the misconduct of the captain; they must all bring their several actions for their respective losses, and no objection could be made to their recovery. Upon the whole, this action, the grounds and nature of which are fully set out in the special count, is founded in the common principles of justice. A loss is incurred, which the law directs shall be borne by certain persons in their several proportions: where a loss is to be repaired in damages, where else can they be recovered but in the courts of common law; and wherever the law gives a right generally to demand payment of another, it raises an implied promise in that person to pay. With respect to the other question, all ordinary losses and damage sustained by the ship happening immediately from the storm or perils of the sea must be borne by the ship owners. But all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expences incurred, must be paid proportionably by the defendant as general average. The rule of consulting the crew upon the expediency of such sacrifices is rather founded in prudence in order to avoid dispute, than in necessity; it may often happen that the danger is too urgent to admit of any such deliberation. Here however there can be no difficulty, for it is found in fact that the cutting of the cable which belonged to the ship was done for the benefit of the cargo as well as the ship.

GEORGE, J. This action is brought to recover a rateable proportion of a certain loss and damage, and expences which have been incurred by the plaintiffs as ship-owners in preventing the owner of the cargo from incurring a loss. That such an action is maintainable I have no doubt. If there be not many instances of the sort to be found, it is probably because the demand has been submitted to without controversy; for I understand that this sort of damage has been continually settled as general average in the city of *London*. Where there is a right, there must be a remedy; and there can be no other remedy than by action to recover damages. It is true, where there are many owners of the cargo there may be as many actions brought, but that arises from the necessity of the thing; and I should still say, that they are all liable to answer for their respective proportions.

LAWRENCE, J. All loss which arises in consequence of extraordinary sacrifices made or expences incurred for the preservation of the ship and cargo come within general average, and must be born proportionably by all who are interested. Natural justice requires this. Then the only argument against this species of remedy is resolvable into this, that the plaintiff chooses to take a difficulty upon himself in proving the amount of a defendant's interest in the cargo in order to ascertain the proportion which he is bound to pay, instead of having recourse to a court of equity, where he can obtain proof of it more easily, and thereby facilitate his remedy. But that objection does not

prove that a plaintiff cannot recover in an action whenever he can make out his case without having recourse to the assistance of a court of equity.

LE BLANC, J. Unless it be shewn by authority that the action does not lie, we must presume that it does, upon the common principle of justice, that where the law gives a right it also gives a remedy.

Postea to the Plaintiffs(a)(1)(2).

Doe on the several Demises of Henry Cock and Charles Cock alias Hopkins v. Cooper.

1 East, 229. Feb. 2, 1801.

A devise of a messuage and land to *R. C.* for the term only of his natural life, and after his decease to the issue of the said *R. C.* as tenants in common; but in case the said *R. C.* shall die without leaving issue, then a devise of the same to *E. H.* in fee; gives to *R. C.* an estate-tail in order to effectuate the general intent. And cross remainders cannot be implied between the issue of *R. C.*

ON the trial of this ejectment at the last assizes for the county of *Sussex*, to recover certain messuages and lands at *Cowfold* in the said county, a verdict was entered for the plaintiff, subject to the opinion of this Court on the following case.

Henry Cock of *Horsham* being seized in fee of the premises in question, by his will duly executed, dated 19th January 1792, (amongst other things) devised the same in the following words: "Also I give, devise, and bequeath unto *Richard Cock*, son of my sister *Elizabeth Cock* deceased, all that messuage or tenement, barns, buildings, farms, and lands, with the appurtenances in *Cowfold* in the county of *Sussex*, to have and to hold unto my said sister's son *Richard Cock* aforesaid for the term only of his natural life; and after his decease, I give and devise the same messuage or tenement, farm, lands, and premises with the appurtenances, unto the lawful issue of the said *Richard Cock*, as tenants in common, to whom I give, devise and bequeath the same: but in case the said *Richard Cock* shall die without leaving lawful issue, then and in such case, after his decease, I give and devise the same messuage or tenement, and farm, with the appurtenances in *Cowfold* unto *Elizabeth Harding*, formerly *Elizabeth Hewitt*, now wife of *S. Harding* of *Horsham*, and to her heirs and assigns." The testator *Henry Cock* died in 1793. *Richard* named in the said devise entered upon the premises immediately on the death of the said devisor, and in the year 1795, suffered a recovery thereof, and conveyed the same in fee to the defendant *William Cooper*, who is now in possession under that title. The said *Richard Cock* died in January 1800, without issue. *Elizabeth Harding*, formerly *Hewitt*, in the said will named, died in the lifetime of the said *Richard Cock*. The said *Henry Cock* (one of the lessors of the plaintiff) is the testator's heir at law, and also the heir at law of the said *Elizabeth Harding*. The question for the opinion of the Court is, whether the said lessor of the plaintiff *Henry Cock* is entitled to recover in this ejectment.

(a) Vide *Masham v. Dutrey*, Select Cas. of Evid. 58. S. P.

(1) Vide *Sims v. Gurney & al.* 4 Binn. 513. *Whitleridge v. Norris*, 6 Mass. Rep. 125. *Maggrath v. Church*, 1 Calnes, 186.

(2) [There being no particular forum for the adjudication of average in either England or the U. States, an adjustment is usually drawn up by a ship-broker, and payment of the sum found respectively due from each party in interest, made accordingly. In case of a general ship, the master commonly takes from the different consignees, before delivery of their goods, a bond or other security for payment of their several portions of the average, after its adjustment. The owners of the ship have a lien on the cargo as well for the average as the freight. See *Abbott on Shipping*, 351. 3 *Stephen's Nisi Prius*, 2190.—W.]

Pooley for the plaintiff contended, that *Richard Cock* the devisee took only an estate for life, and that his issue took estates tail as tenants in common, with cross remainders; and consequently the recovery suffered by the first taker was of no avail. The intent of the testator is express, that *Richard Cock* should take "for the term *only* of his natural life." And there being no words of inheritance added to the limitation to his issue, they would in the first instance only take estates for lives by implication; but inasmuch as the remainder over was only to take effect upon the dying of *Richard Cock* without leaving any issue, and as the issue were to take as tenants in common and not in succession, in order to effectuate the intention of the testator cross remainders must be raised between the issue. [Lord *Kenyon*, C. J. Is it not a settled rule that cross remainders cannot be implied between more than two? Then here is an estate of inheritance afterwards given to the first taker; for the remainder over was not to take effect till failure of his issue. But supposing the remainder to the issue to be a contingent remainder, it was put an end to by the destruction of the particular estate on which it depended before the contingency happened.] Cross remainders may be raised even between more than two, if it be necessary to give effect to the testator's intent. The case of *Gilbert v. Witty*, Cro. Jac. 655, has been much shaken since in *Phipard v. Mansfield*, Cowp. 797, and *Twisden v. Locke*, Amb. 665. It is not necessary, as was said by Lord *Kenyon* in *Doe v. Wainwright*, 5 Term Rep. 430, to use any precise form of words in order to give cross remainders; and if the testator's intention can only be effectuated here by giving an estate of inheritance to the children, it directs in substance cross remainders: for not otherwise can the entire estate go over to the person in remainder, which was the clear intent of the testator, as it is not to go over till the event of *R. C.* dying without leaving issue. It was truly said in *Phipard v. Mansfield*, that the intent of testators in general is to raise cross remainders between children; and the courts have been anxious to lay hold of any words in a will to give it that construction. Thus where the devise over was of *all* the testator's said lands after a devise to issue, it was construed to raise cross remainders between the issue; the intent being apparent that no *part* should go over without the rest. *Maynell v. Read*, Pollex. 425. and *Holmes v. Maynell*, T. Ray. 452. So where the devise is to children, issue, &c. and if they *all* die without issue then over. Dy. 303. b. pl. 49. So *here* the deviser gives over the *same* message, &c. In *Phipard v. Mansfield*, Cowp. 797, where the devise was to *three* and the heirs of their bodies as tenants in common, and *in default of such issue* to the testator's own right heirs, cross remainders were implied. The like construction prevailed in *Atherton v. Pye*, 4 Term Rep. 710. [Lord *Kenyon*. In that case there were words of limitation added to the devise to the daughters; and this forms a principal ground of distinction in these cases.] By the subsequent part of the will there is an estate of inheritance created which is to be coupled either with the express estate for life before given to *Richard Cock*, or with the estate of freehold before raised by implication of law in the issue. Now the testator's intention requires that the estate of the second takers should be enlarged, and there is no rule of law to restrain such a construction. The giving an estate of inheritance by implication of law to the first taker is a mere technical rule of property, which may be controlled according to the doctrine of Lord *Mansfield* in *Doe v. Lamington*, 2 Burr. 1100, by the apparent intent of the testator to the contrary. It is true, that according to this construction the word *issue* must be construed to be a word of purchase in one part and a word of limitation in another part of the will; but there is no objection to that. 2 Stra. 804. And though Lord *Kenyon* in *Doe v. Applin*, 4 Term Rep. 87, seemed to intimate that there was some difficulty in putting a different construction on the same word in different parts of the same will, yet he did not deny that it might be done. [Lord *Kenyon*. Certainly what was there said was only with reference to the

particular case before the Court; for no doubt the same word may be used in different senses in a will if the intent to do so be obvious.] Here that intent appears. For by giving the estate to the issue as tenants in common it is evident that he did not intend that they should take by descent from *Richard Cock*; and having before given him an estate for life *only*, it is plain that where he uses the word *issue* afterwards as a word of inheritance he must have intended it to apply to the estate before given to the issue of *R. C.* as purchasers. Suppose an estate devised to *A.* for life, remainder to the issue of *B.* as tenants in common, and if *B.* die without issue then over; in that case *A.* could not take an estate of inheritance, and therefore such estate must connect itself with the estate before given to the issue of *B.* as purchasers. Suppose here the devise over had been in case *Rd. Cock* should die without leaving *descendants*, he could not have taken an estate-tail. Now no more benefit was intended to *Rd. Cock* in the devise over "in default of his leaving issue" than if he had been a mere stranger. He was only named by way of describing the descendants of the person who were to take before the ultimate remainder took effect, and not by way of making him the stock of succession to future generations; for his children were to take as tenants in common, forming so many distinct stocks. Therefore, if the testator meant to create any estate of inheritance by these words it must have been with a view to couple it with the estates for lives before given to the tenants in common. The case of *Doe v. Applin*, 4 Term Rep. 82, where the devise was to *A.* for life, and after his decease *to and amongst his issue*, and in default of issue then over, has been since considered in *Burnsall v. Davy(a)* as going further than any case in giving an estate-tail to the first taker by the rejection of the word *amongst*, and the authority of it has been therefore questioned. And in *Doe d. Candler v. Smith*, 7 Term Rep. 531, upon a devise of something similar, there was an express estate-tail afterwards given to the first taker.

Marryat, contra, was stopped by the Court.

LORD KENYON, C. J. Cases of this kind have been so much agitated of late, that all the arguments occur readily to one's mind, and after the decisions which we have made we should not be consistent with ourselves if we were not to hold that the first taker took an estate-tail in this case. It has been the settled doctrine of *Westminster-Hall* for the last forty or fifty years, that there may be a general and a particular intent in a will, and that the latter must give way when the former cannot otherwise be carried into effect. I remember that point was much discussed in the case of *Robinson v. Robinson*, 1 Burr. 38. I heard it argued the first time before a very great lawyer Sir *Dudley Rider*, who then presided in this court. A second argument was directed, but he died before it came on. It was argued a second time before Lord *Mansfield*, and the certificate, which was afterwards returned upon the greatest deliberation, is in print. Nothing could be more positive than the words of the will in that case to shew a particular intent that the first taker should take an estate for his life *and no longer*. But there was a general intent apparent, which could not be effected but by giving him an estate-tail, and on that the decision was founded. The case was carried up to the House of Lords while Lord *Hardwicke* sat there, and was much considered by him; and questions were put to the Judges upon it framed by him in every possible shape; and Lord Ch. B. *Parker*, who is known to have been a very strict lawyer, delivered their opinions agreeing with the judgment of this court. The same question came on again to be considered in *Roe d. Dodson v. Grew*, 2 Wils. 323, in the Court of Common Pleas, and was there much canvassed, and underwent the same determination. Then came on the case of *Doe on the demise of Candler v. Smith*, in the 7 Term Rep. 531, in which I thought

(a) 1 Bos. & Pull. 221. Vide what was said by Lord *Kenyon* relative to this opinion in *Doe v. Halley*, 8 Term Rep. 7.

I could not make the matter more clear than by reading the words of Lord Ch. J. *Willes* in *Roe d. Dodson v. Grew*. I will not go through all the cases again which have been so fully considered in those I have alluded to. Perhaps we should best fulfil the particular intent of the testator in this case by giving *Richard Cock* only an estate for life; but the general intent was, that all his issue should inherit the entire estate before it went over; and that intent can only be answered by giving him an estate-tail by implication from the subsequent words "in default of his leaving issue." It is suggested, that it would answer the same purpose if we were to raise cross remainder by implication between the children of *R. C.* But to do this between more than two without any thing further than what appears here would be directly contrary to former authorities; and it would also be in express contradiction to the rule of law in *Comber v. Hill*, 2 Stra. 969, that an heir at law shall not be disinherited but by express words or necessary implication, whereas such a construction would operate to disinherit him by a very weak and remote implication.

GROSE, J. The only question is, What upon the whole of the will appears to have been the intent of the testator? and this has been truly stated to be, that *Richard Cock* should first take the estate, and after him his children, and that the remainder over should not take effect so long as any of his descendants remained. Then this general intent can only be carried into effect by giving the first taker an estate-tail.

LAWRENCE, J. The principal part of the plaintiff's argument is founded upon the raising of cross remainders by implication between the issue of *R. C.*; but it is a settled rule that they shall not be implied between more than two, unless such appears on the face of the will to have been the intention of the testator: but no such intent appears in this case from the words of the will. Nor can it be implied merely from the circumstance that the remainder over was not to take effect but upon the dying of *R. C.* without leaving issue. The case of *Doe d. Candler v. Smith*, is very like the present. That was a devise to *A.* for life, remainder to the heirs of the body as tenants in common, and in case *A.* died before 21, or without leaving issue of her body, then over: and this was holden to give *A.* an estate-tail. It was very clear in that case that the testator's particular intent was only to give *A.* an estate for life, because the issue were to take as tenants in common, and therefore could not take by descent; yet in order to effectuate the general intent the estate of inheritance implied from the subsequent words was annexed to the prior estate for life given to the first taker. That applies strongly to the limitations in the present case.

LE BLANC, J. I can find no words in the will to raise cross remainders between the issue; and if not, we cannot imply them without breaking in upon the settled rule that cross remainders shall not be implied between more than two(1). Then the general intent of the testator cannot be effectuated without annexing the subsequent estate of inheritance to the estate of the first taker, and giving him an estate-tail(2).

'The Mayor, &c. of London v. Dias.

1 East, 237. Feb. 4, 1801.

An affidavit to hold to bail, sworn by a clerk in the Chamberlain of London's office as to the existence of the debt, and that no tender of it had been made in Bank notes to the best of his knowledge and belief, held sufficient in an action brought by the corporation.

THE defendant was arrested and holden to bail upon the following affida-

(1) Vide *Doe d. Foquett v. Worsley*, post, 416.

(2) Vide *Pierson v. Vickers & al.* 5 East, 548.

vit : "*James Byfield*, clerk to *Richard Clarke*, Esquire, Chamberlain of the city of *London*, maketh oath and saith, that *George Dias* is indebted to the Mayor, &c. of *London* in 22*l.* 19*s.* 3*d.* for certain arrears of rent due from the said *George Dias* to the said Mayor, &c. for the use and occupation of certain parcels of ground," &c. concluding in the usual form with negating a tender of the debt in Bank notes, to the best of his knowledge and belief.

Hovell, on a former day, obtained a rule *nisi* for discharging the defendant on common bail for the insufficiency of the affidavit to hold to bail, it having been sworn to by a clerk in the Chamberlain's office instead of by his principal; and because, for aught appeared, a tender in Bank notes may have been made to the Chamberlain, though not within the knowledge of the deponent; and he cited *Cass v. Levy*, 8 Term Rep. 520.

Dampier now shewed cause, stating that this mode of swearing was always allowed where from the nature of the thing the parties themselves could not swear to their own knowledge of the debt. It had been admitted in the cases of executors, assignees of bankrupts, and agents of principals residing abroad, and could not be otherwise in the case of corporate bodies. That the deponent in this case being a clerk in the Chamberlain's office who had the management of all corporation business of this kind, was a more likely person to have a competent knowledge of the facts contained in the affidavit than the Chamberlain himself; and he cited *Munro v. Spinks*, 8 Term Rep. 284, and *Cresswell v. Lovel*, ib. 418.

Lord KENYON, C. J. This case does not go further in principle than those in which affidavits to hold to bail in this form have been decided to be sufficient. The affidavit must have been made by some of the officers of the corporation; and the Chamberlain himself, who certainly could not know more of the matter than the clerk in his office, could not have sworn in any different manner, or with more certainty than the clerk has done.

Per Curiam,

Rule discharged(1).

The King v. the Inhabitants of Martham.

1 East, 239. Feb. 4, 1801.

A. clubbed with *B.* (which signifies serving another for the purpose of learning a trade) for three years at a certain rate of weekly wages, with a proviso that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionable deduction of wages; held that *A.* gained a settlement by serving a year under this hiring, though occasional deductions on these accounts were made.

TWO justices removed *E. Green*, *Mary* his wife, and their six children by name, from the parish of *St. Paul* in the city of *Norwich*, to that of *Martham* in *Norfolk*. The Sessions on appeal confirmed the order, and stated the following case for the opinion of this Court.

The pauper *E. Green* was legally settled at *Martham*, where he worked as a labourer with his father, who was a bricklayer there. In 1782, being then 17 or 18 years of age, he came to the parish of *St. Paul* in *Norwich*, and worked as a labourer with *Chadley* a bricklayer for about six months, when by an agreement made by the pauper's uncles *J.* and *F. Littleboy* he was clubbed to his said master for three years at the wages of 7 shillings per week for the first year, 8 shillings for the second, and 9 shillings for the third, to learn the trade of a bricklayer, and to do any other work his master might set him about. The above wages were the usual wages of a bricklayer at that time. The pauper was to board, lodge, and wash for himself; and if prevented at any time from working by badness of weather, illness, or from his master not having employment for him, a proportionable deduction was to be made from

(1) Vide *Knight v. Keyte*, post, 415.

his week's wages for such loss of time. Occasional deductions of a day or two's labour were made. The pauper sometimes drove his master's cart employed in his business, and sometimes drove his mistress an airing. Whenever he was employed by his master either as a bricklayer or as above stated, no deduction was made from his wages. He continued three years in the employment of his master under the preceding contract. From these circumstances the Sessions considered this as a contract of apprenticeship between the parties, and confirmed the order.

When this case was called on, the Court asked the counsel in support of the order whether it were possible to distinguish this from the case of *R. v. Cot-tishall*, 5 Term Rep. 193, where a settlement was gained by serving under such a hiring.

Wilson and *Marsh* attempted to distinguish the cases by observing that here was a stipulation in the contract, that in case of illness, bad weather, or want of employment, the pauper was to have no wages: whereas to enable one to gain a settlement by hiring and service, the contract must continue during the whole year. But the necessary construction of this agreement must be, that if the master had no employment for the pauper, or the weather were too bad to admit of his usual work, in which cases he was to have no wages, he should be at liberty to work for any other master. But

The Court thought that this did not sufficiently vary this case from the former; and that if they drew such refined distinctions they should leave the justices below without any rule to guide their determinations.

Both Orders quashed.

Alderson was to have argued *contra*.

Smith v. Burlton.

1 East, 241. Feb. 5, 1801.

The rule of Court of the 4th Geo. 2. requiring an attorney to be present on behalf of a prisoner at the time of his executing a warrant of attorney to confess judgment, does not apply to a case where the party was in custody at the time at the suit of a third person.

A RULE was obtained calling on the plaintiff to shew cause why the warrant of attorney given in this cause should not be delivered up to be cancelled, and why the judgment and execution issued thereon should not be set aside, &c. The principal ground made for the rule in the defendant's affidavit was, that being a prisoner in the King's Bench prison, the warrant of attorney was obtained from him by the plaintiff, (also in custody in the same prison) by the intervention of another prisoner of the name of *Bland*, who acted as agent or attorney for the plaintiff, no person being present on the part of the defendant at the time when the instrument was executed. It appeared, however, from a comparison of the several affidavits on shewing cause, (and on which the question at length turned), that the defendant was not at the time in custody at the plaintiff's suit, but at the suit of another person. And it was sworn by *Bland*, that he had not acted as attorney for the plaintiff, but had only interfered as a friend to both parties, though originally at the solicitation of the plaintiff.

Marryat for the plaintiff, on shewing cause, contended that the rule of court of the 4 Geo. 2. (a) engrafted on a former rule of the 15 Car. 2. (b), requiring an attorney to be present on the part of a prisoner at the time of executing a warrant of attorney to confess judgment, only relates to prisoners in the custody of a sheriff's officer. The words to the latter rule are "sheriff

(a) R. and O. of K. B. 9.

(b) See Tidd's Prac. 461.

or other officer," which have always had that construction^(a). At any rate, the rule does not apply to cases where the defendant is not in custody at the suit of the party to whom the warrant of attorney is given. *Finn v. Hutchinson*, 2 Ld. Ray. 797. *Holcombe v. Wade*, 9 Burr. 1792. *Churchy v. Rosse*, 5 Mod. 144, and the same is recognized by Lord Mansfield in *Gilman v. Hill*, Cowp. 142.

Lawes in support of the rule said, that as it was not positively sworn that the defendant was in custody at the suit of another person, he had considered that the plaintiff meant to rely on the circumstance of the defendant's assenting that *Bland* should act for himself as well as for the plaintiff; but in *Hutson v. Hutson*, 7 Term Rep. 7, this had been deemed not to be sufficient to take the case out of the rule of Court. If however the Court thought that the fact now insisted upon (which he was not prepared to deny) sufficiently appeared upon the affidavits, he could not distinguish this from the cases cited; though he contended that this case fell as much within the principle of the rule of Court, which was intended for the protection of prisoners who could not readily have access to proper advice, as if the defendant had been in custody on mesne process at the suit of the plaintiff himself.

LORD KENYON, C. J. I am sorry to find that the weight of authority is with the plaintiff. If this had been *res integra* I certainly should not have put the same construction on the rule of Court of the 4 Geo. 2. as appears to have been done by the cases cited. That rule was made in order to protect those who were not in a condition to protect themselves, and therefore I would not have frittered away one word of it. I should rather have said, it made no difference whether a prisoner were in custody upon mesne process or in execution, or whether at the suit of the plaintiff or of any other person; or whether in charge of the sheriff, or any other description of officer. The case indeed in Lord *Raymond* was before the 4 Geo. 2.; but as the cases since have followed up the same construction, and mankind have acted upon it for so long, I must acquiesce in the decision however reluctantly.

GROSE, J. I am sorry that the rule of Court has been so pared away; but as the case in question has been so expressly determined not to fall within it, we must abide by the decision.

LAWRENCE, J. The case of *Hutson v. Hutson* only determined that where a party was within the rule he should not be permitted to waive the benefit of it by any consent at the time. But here the defendant has not brought himself within the rule,

LE BLANC, J. of the same opinion.

Rule discharged.

Graham v. Peat.

1 East, 244. Feb. 5, 1801.

One in possession of glebe land under a lease void by the stat. 18 Eliz. c. 20, by reason of the rector's non-residence may yet maintain trespass upon his possession against a wrong-doer.

TRESPASS *quare clausum fregit*. Plea, the general issue, (and certain special pleas not material to the question). At the trial before *Graham*, B. at the last assizes at *Carlisle*, the trespass was proved in fact; but it also appeared that the *locus in quo* was part of the glebe of the rector of the parish of *Workington* in *Cumberland*, which had been demised by the rector to the plaintiff, and that the rector had not been resident within the parish for five

(a) See Tidd's Prac. 465. But the Court will interfere in such cases by virtue of its general authority, though the defendant was in custody of the marshal. *Parkinson v. Caines*, 3 Term Rep. 616.

years last past, and no sufficient excuse was shewn for his absence. Whereupon it was objected that the action could not be maintained, the lease being absolutely void by the act of the 13 Eliz. c. 20, which enacts, "that no lease of any benefice or ecclesiastical promotion with cure, or any part thereof, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year; but that every such lease immediately upon such absence shall cease and be void." And thereupon the plaintiff was non-suited.

A rule was obtained in *Michaelmas* term last to shew cause why the non-suit should not be set aside, upon the ground that the action was maintainable against a wrong-doer upon the plaintiff's possession alone, without shewing any title.

Cockell, Serjt., *Park*, and *Wood*, now shewed cause, and insisted that possession was no further sufficient to ground the action even against strangers than as it was *prima facie* evidence of title, and sufficient to warrant a verdict for the plaintiff, if nothing appeared to the contrary. But here it did expressly appear by the plaintiff's own case that his possession was wrongful, for it was a possession in fact against the positive provisions of an act of parliament, without any colour of title even against strangers, 1 Leon. 307. He was not even so much as tenant at sufferance: though it is not certain that this latter can maintain trespass(a). It is settled, that the plaintiff could not have maintained an ejectment against a stranger who had evicted him(b). It appears from *Plowd.* 546, that there must not only be a possession in fact of land to maintain trespass, but the possession must be lawful at the time. And an instance is given if the king be seised in fee, and a stranger enter upon him claiming title and continue in possession a year and a day, yet he cannot maintain trespass against a wrong-doer. And though 5 Com. Dig. 537, says that he may, yet the authority cited for it does not warrant the position, and directly contrary to an adjudged case in 4 Leon. 184. [Lord *Kenyon*. That goes upon artificial reasoning that the king cannot be dispossessed by an intruder, and does not apply to other cases.] Suppose there had been a plea of soil and freehold of the rector, and that the defendant as his servant and by his command entered, &c.; it being settled(1) that there cannot be a traverse to the command(c), the plaintiff must either have traversed its being the title of the rector, or have shewn a legal possession consistent therewith, as that he had a lease from him; and then it would have been shewn in answer that the lease was void by the statute; and either way there must have been judgment against the plaintiff. Now it was equally competent to the defendant to avail himself of this upon the general issue.

Law, *Christian*, and *Holroyd*, contra, were stopped by the Court.

Lord KENYON, C. J. There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against a wrong-doer; and if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrong-doer. Suppose a burglary committed in the dwelling-house of such an one, must it not be laid to be his dwelling-house notwithstanding the defect of his title under the statute.

Per Curiam,

Rule absolute(d).

(a) Vide 5 Com. Dig. tit. Trespass, B. 1, where it is said, that he may against a stranger, and cites 2 Rol. Abr. 551. l. 42, but this latter book lays down the position with "contra 9 H. 6. 48. b. admit."

(b) *Doe d. Crisp v. Barber*, 2 Term Rep. 749.

(1) It is now settled otherwise. *Chambers v. Donaldson*, 11 East, 66.

(c) Vide 6 Co. 24, a. and Salk. 107, but if both parties claim under the same person the command is traversable, for it would be absurd to traverse a title which both admit. Cro. Car. 586.

(d) "Whoever is in possession may maintain an action of trespass against a wrong-doer"
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The King v. The Inhabitants of Houghton Le Spring.

1 East, 247. Feb. 6, 1801.

A pauper, having a freehold estate in the parish of *A.* in the occupation of a tenant to whom he had let it, was deemed to gain a settlement by residing thereon 40 days with the licence of his tenant for the purpose of making some repairs, such residence being considered as equivalent to a residence in any other part of the parish.

TWO justices by an order removed *George Harwell* from the township of *South Shields* to the township of *Houghton le Spring*, both in the county of *Durham*. The sessions on appeal confirmed the order, subject to the opinion of this Court on the following case.

The pauper *G. Haswell* acquired a settlement by apprenticeship with one *Gally* a mason in the township of *Houghton le Spring*. Shortly after the expiration of his apprenticeship, he became entitled as heir at law to his cousin *M. W.* to three copyhold houses, let at 6*l.* a-year, and one freehold house at *Sedgfield* in the county of *Durham*. Upon his becoming so entitled, he agreed to let and did let to one *Robert Wood* the freehold house at 3*l.* per annum, the pauper undertaking at the same time to sink a cellar and make some repairs in the premises. *Wood* accordingly entered and occupied the premises as a public house. The pauper in pursuance of his agreement, after such possession by *Wood*, went from *Houghton* (where he lodged with his father (to *Sedgfield*, for the sole purpose of sinking the cellar and making the repairs agreed upon. He was occupied in such work for upwards of forty days, during the whole of which time he resided as a lodger in *Wood's* house. After finishing the work he returned to his father's. During the whole of the pauper's living at *Sedgfield* on the occasion aforesaid, the copyhold houses were in mortgage to the said *Robert Wood* for 40*l.* The pauper continued in the receipt of the rents of the whole of the premises for several years, and then sold the same for 130*l.*

Holroyd and *Hullock*, in support of the order of sessions, contended that the pauper, who was once settled in *Houghton le Spring*, did not acquire a subsequent settlement in *Sedgfield* by residence in the parish where he had an estate of his own in the occupation of another. 1st, The residence itself in the parish was occasional and accidental only, being for the special purpose of repairing the house which he had let to *Wood*. He did not reside there in his own right, but merely by the licence of *Wood* and as his servant; which is not sufficient to confer a settlement; as was holden in *R. v. Catherington*, 3 Term Rep. 771, where a mortgagor, who was permitted by the mortgagee in possession to reside in the house for the purpose of overlooking some repairs which he proposed to make on the mortgaged estate with an intent to sell the same and pay off the mortgage, was adjudged not to have gained a settlement by such residence; although it is clear that a mortgagor in possession has such an interest as will confer a settlement by residence on his estate for forty days. It did not indeed appear there whether or not there were any surplus after payment of the mortgage money; but nothing turned on that point. The utmost therefore that can be collected from the facts here stated is, that the pauper resided in fact in the same parish in which his estate was situated. But, 2dly, that has never been deemed sufficient to confer a settlement, unless the owner was in the actual possession of it. It was indeed long doubted whether residence in the same parish where a party had property in his occupation were

"to his possession." *Harker v. Burbeck*, 3 Burr. 1568. So *Cary v. Holt*, 2 Stra. 1288. "Trepass is a possessory action founded merely on the possession, and it is not at all necessary that the right should come in question." *Lambert v. Stroother*, Willes' Rep. 221.

sufficient to confer a settlement unless he also resided upon it: that point however was settled in the affirmative in *R. v. Sowton*, Burr. S. C. 125.; but the doubt could never have arisen if it had been considered to be immaterial whether or not the owner were in possession. The reason of the determination, that a person could not be removed from his own estate, was because it would be a disseisin of him from his freehold: but that can only apply where he is in the actual occupation of it at the time; for otherwise it is no disseisin of him to remove him from any other property than his own. One who has leased his estate, as in this instance, has no more right to reside on it than a stranger: In order to gain a settlement by being irremovable from a tenement of 10*l.* yearly value, the party, though he need not reside on the estate provided he reside in the same parish, must stand in the relation of tenant to the premises; otherwise as Lord *Kenyon* observed in *R. v. South Lynn*, 5 Term Rep. 664, every lodger or servant would gain a settlement. If this be sufficient, two persons may gain settlements in respect of the same property, though not more in value than 10*l.* a-year, the one as tenant, the other as landlord(a). But though the particular point in judgment does not appear to have been expressly adjudged, there are several *dicta* in the books which shew that it has been considered that a person may be removed from a parish wherein he had property if he were not in the occupation of it himself. In *R. v. Dunchurch*, Burr. S. C. 553, (which was the case of a purchase under 30*l.*) the pauper had at first resided in her own house, from whence she afterwards removed to another part of the same parish, and let the house to her son, under the idea that while she continued to live on her own freehold she could not be removed. There Lord *Mansfield* said, "as to removing a person from their own, she became "an object of removal *as soon as she had let it to her son.*" In another report of the same case, 1 Blac. Rep. 598. *Wilnot*, J. says, "undoubtedly she might be removed from the parish, *not residing in the house which was her own*(b)." [Lord *Kenyon*. That being a purchase under 30*l.*, the act of the 9 Geo. 1. c. 7. intervened, which provides that the purchaser shall continue irremovable no longer than while he *shall inhabit in such estate*. And a distinction has always been taken in that respect between the cases where the property came to the party by his own act or by operation of law.] In *R. v. Sowton*(c), which was not a case within the statute, it must be understood that the party was in possession of his property; for it was said by Lord C. J. *Lee*, "it appears that he came to *Sydbury* to make it *his home and habitation.*" Besides which, the general expression which runs through all this class of cases, that a party shall not be removed *from his own estate*, seems to imply that he must be *in the possession* of it, though he need not actually reside thereon.

Ward, contra, in answer to the cases cited, observed that in *R. v. Catherington* the mortgagee was in possession, and there did not appear to be any surplus on which the interest of the mortgagor could attach; therefore as Lord *Kenyon* observed, the latter had neither *jus in re* nor *ad rem*. That case turned on another of *R. v. St. Michael's, Bath*, Dougl. 630; Cald. 110, which was considered as the case of an insolvent who had conveyed all his interest in the property to trustees for sale and payment of his debts, without a probability of any surplus; and the possession of which property he afterwards fraudulently obtained. Whereas here the pauper had a substan-

(a) See the case of *Llandovery v. Northop*, Burr. S. C. 571, where it appears this may be done even in the case of an underletting, provided the part underlet be of the annual value of 10*l.* But there the original tenant still continued to reside on a small part of the premises of the annual value of 40*l.*

(b) Opposite the passage in question in the margin is this abstract: "A pauper may be removed from a parish in which she has a freehold, not living therein." Whether this were written by the learned judge himself does not appear. The work was published by his executors; but see the preface, p. 23.

(c) Burr. S. C. 125. There is a fuller note of this case in Andr. 345.

tial freehold interest in the parish where he resided, and an undisputed residue in the copyhold premises. In *R. v. Sowton* the party did not reside on his estate, but continued at an alehouse in the same parish for more than forty days, as a traveller or guest; and yet it was ruled that he gained a settlement. As to the case of *R. v. Dunchurch* an answer has been already given. He then contended, 1st, that a man cannot be removed from his freehold or other estate devolved on him by operation of law, whatsoever the value may be. The reason is given by *Foster, J.* in *R. v. Aythrop Rooding*, Burr. S. C. 414, because by *magna charta* "none shall be disseised of his freehold." 2dly, A residence in a parish for 40 days irremovable will gain a settlement where it is to be derived from property, unless in the excepted case of residence upon a purchase under 30l., by the stat. 9 G. 1. c. 7. 3dly, It is not necessary to reside on the identical estate of the party; but it is sufficient if he reside in the same parish. *Ryslip v. Harrow*, Salk. 624; *Sowton v. Sydbury*, Burr. S. C. 128; *R. v. St. Nyotts*, Ib. 133; and *R. v. Hasfield*, Ib. 147. 4thly, It is not necessary for the purpose of gaining a settlement in these cases that the owner should actually occupy his estate; it is sufficient to reside in the parish where he has a freehold. Here indeed the residence was in fact upon the pauper's own property; but though that were admitted to have been with the licence of *Wood* only, yet it is at least equivalent to residence in any other part of the parish. In most of the cases it is true that the occupation went along with the title, but in some of them that does not distinctly appear, and the fact may have been otherwise. In *Ryslip v. Harrow*, Lord *Holt's* language is general, that "living in a parish where one has land will give a settlement." It is not qualified by saying that it is necessary to reside on it. He also adds, "the law takes notice of freeholders as those "who choose members of parliament and are jurors." It is then to be considered what is a freeholder; an occupation not being necessary to give him a vote, in order to make the allusion apply, it cannot be necessary to confer a settlement. From the report of the case of *Wookey v. Hinton Blewet*, 1 Stra. 176, it is competent to argue that a pauper may be sent to a parish in which he has land, though in the occupation of another: at any rate, no stress was laid on the circumstance of occupation. The same observation arises upon the language made use of by the Court in *Burcleare v. Eastwoodhay*, Ib. 163, and on the words of the act of 9 Geo. 1. c. 7. s. 5, where it is enacted, that no person shall acquire any settlement by virtue of any purchase of "any estate "or interest" in any parish, &c. the consideration of which was less than 30l. If occupation had been considered as essentially necessary, the word *interest* would not have been used. But the case of *R. v. Hasfield*, Burr. S. C. 147, is in point. There an infant eight years old was removed from *Tirley* to *Hasfield*: and it appeared, that on the death of his parents a year and a half before he became seised in fee by descent of an estate at *Tirley*; and he and an infant sister, "being in the said parish of *Tirley* with their grandmother "their nearest relation above 40 days," were removed from thence to *Hasfield*, where their father was settled at the time of his death. Lord C. J. *Lee* made a difference between the case of the two children. He said, "*Benjamin* is "seised in fee of an estate in *Tirley*, and it is not material *quo animo* he came "into that parish, or how long he has been in it: it is not a case within the "13 & 14 Car. 2. c. 12., because having an estate of his own in the parish, "he is not removeable from it." In *Sowton v. Sydbury* "the difficulty was "upon the residence of 40 days in a place where the man was to gain a settlement in respect of his freehold. But I think it clear that *Benjamin* could not be removed from his freehold." *Probyn* and *Chapple, Js.* "concurred that "*Benjamin* could not be removed from the parish where he had a freehold." Now it is plain from the language of the Court that the point of residence upon the property was put entirely out of the question. Besides, it is impossible to consider that a child of such tender years could be in the actual pos-

session of the property ; and it is probable that the grandmother did not reside upon his estate.

LORD KENYON, C. J. The case last cited has relieved me from any further difficulty. When I first read the case before us, I had a full conviction on my mind that it was a decided point that residence for forty days in the parish in which the party had a freehold estate would confer a settlement there, whether he resided on the estate or not, or whether or not he were in the occupation of it. The cases which were at first cited distressed me considerably, because it was argued that there was no authority in point, and that in all the cases which had been determined in favour of the settlement being gained the fact of the occupation by the pauper occurred, and that the reasoning of the Judges in those cases shewed that it was a necessary ingredient in the judgment. It seemed to me, however, to be a most extraordinary proposition to establish, that a man might be removed from a parish in which he had property, perhaps to a considerable amount, but whether more or less in such a case is unimportant, because he has let it out ; and that if he afterwards come there again, he was liable to be treated as a vagrant. A man, though not in the actual occupation of his own estate, may have many reasons for wishing to live in the neighbourhood of it. He is entitled to the privilege of superintending it. But according to the doctrine contended for, he may be sent to another part of the kingdom, if his settlement happen to be there. There are instances of whole townships belonging to the same person, the whole of which may be in lease ; and if the landlord were to reside in the house of any of his tenants, can it be imagined that he would be liable to be removed by an order of justices ? I was sure that the contrary had been decided ; and I have a MS. note of the case cited, though I could not recall it at once to my memory. Even in the absence of any express authority upon the subject I should have formed the same opinion, and I am sure the current of opinions has gone that way. However, I am glad to be relieved from all difficulty by the case which has been cited. There the child residing with his grandmother cannot be taken to have been in the actual occupation of the property ; nor did the judgment of the Court proceed upon any such ground. This is not a case falling within the act of the 9 Geo. 1, like some of the cases cited, which, as I have before observed, are excepted out of the general rule by the very words of the act.

GROSS, J. The general impression on my mind has been, that if a party resided in the same parish where he had property, whether he resided on it or not, he gained a settlement : but I am not aware that my attention was ever before particularly pointed to the distinction between a legal and an actual possession of such property. Here indeed the pauper was corporally resident upon the property : but I consider that the possession was, properly speaking, in the lessee. Now by distinguishing this case out of the general rule, we are splitting the rule unnecessarily, so as to make it more difficult for the magistrates below to act upon it. That the rule itself is large enough to include this case appears from the passage cited from the case of *Ryslip v. Harrow*, as said by Lord Holt, and also from the opinion of the Judges in *R. v. St. Nyott's*, particularly what was said by the three judges who agreed in opinion with Lord C. J. Lee, that if a man "*have lands of inheritance in the parish* it is not necessary that the residence should be upon the lands ; it is enough if he side in the parish." They do not say, "if he have lands of inheritance in possession in the parish," &c. In addition to these is the case of *R. v. Hasfield*, upon which very proper comments have been made. The reason assigned by Lord C. J. Lee why the boy was not removable within the statute of Car. 2. is, "because he had an estate of his own in the parish ;" he does not say, an estate in his possession or occupation. Upon the whole, therefore, I would rather abide by the general rule than qualify it with the exception now contended for, which does not seem to be grounded in the opinions of our prede-

cessors. And therefore, I am of opinion that a settlement was gained in *Sedgfield*.

LAWRENCE, J. I must own I have great doubts upon this subject. If I thought that the rule had been once settled so as to embrace the point before us, whichever way the decision had been I would on no account disturb it. I have always conceived the rule to be, that where a man is in the occupation of an estate of whatever value which came to him by operation of law, he may gain a settlement by residing in the same parish for forty days: but I cannot find any case where if he parted with the possession the same rule has prevailed. On the contrary, the reasoning of the Judges in the several cases referred to seems rather to go the other way. In *Ryslip v. Harrow*, Salk. 524, Lord Holt assigns as a reason for the rule which has been mentioned, that "the act of Car. 2. never meant to banish men from the enjoyment of their own lands;" which only applies to a case of actual occupation. So in the case alluded to of *R. v. Aythrop Rooding*, Burr. S. C. 414, the reason assigned by Foster, J. why a man should not be removed from his own is "because none shall be disseised of his freehold." But how is he disseised by the removal, if he had before let it to another? He loses no right which he before enjoyed; he is still entitled to receive his rents the same as before, and he could have had no more if he had remained in the same parish. If however the last case mentioned of *R. v. Hasfield* had decided the point, I should have abided by it: but it does not appear upon the statement of the case that the grandmother was not living at the time in the house of the infant, and therefore she might be considered as having a possession for the infant, which would be the same thing for this purpose as his actual possession. It is difficult to say how far the argument may be carried. A man may have a legal title, and yet be out of possession: would it be contended that in such a case he might gain a settlement by forty days residence in the same parish? Would the same rule extend to the case of one who has a reversionary interest? Upon the whole, not thinking that the cases have hitherto gone further than to give a settlement to one who is in possession of his own estate, I have great doubts how far the rule ought to be extended further. Here I cannot consider the pauper as being in possession of the premises at the time. He was merely permitted to reside there for a special purpose by the licence of the tenant, who might have turned him out at a moment's warning.

LE BLANC, J. This is a new question of which I also have great doubts, and should like to have further time for consideration. There are expressions which have a contrary tendency to each other in the very same case, and coming from the same Judge. For in *Ryslip v. Harrow*, Lord Holt is first made to say, that the law takes notice of *freeholders, &c.*; from whence it is to be inferred that he thought that residence in a parish where a man had a *freehold*, though not in possession, would confer a settlement. But when he had before said that the statute never meant to banish men from the *enjoyment* of their own lands, it seems as if he were speaking merely of persons in possession of their own property. It cannot, therefore, be collected with any certainty how the fact stood in that case. So in the case of *R. v. Hasfield* it does not appear whether the boy, though too young to be in the actual possession himself, were not resident with his grandmother upon his own property. If so, it leaves the question as it was before. As to the circumstances of the present case, I consider it to be the same as if the pauper had lodged at any other public house within the parish, and not in that of which he was the landlord; for it is stated that he had before agreed to let it to Wood, and that Wood had actually entered and occupied the premises, and that the pauper afterwards resided there as a lodger in Wood's house. He had therefore no right of possession, and Wood might have turned him out whenever he pleased. This therefore must be considered as a case where

the party had property in the parish, but that he did not reside on it, and that another was in possession of it. And that brings it to the true question, Whether such a one can gain a settlement by residing for 40 days in the same parish. At first, I thought the question had been decided by the cases of *R. v. Sowton* and *R. v. St. Nyott's*; but upon looking more narrowly into them I find there are circumstances of doubt whether the party were not in possession of the property. Perhaps on looking further into the cases, and particularly into that of *R. v. Hasfield*, we may find something decisive to direct our judgments. But if it should be found to be altogether a new question, the inclination of my opinion is, that a person who has not the possession but only the property of an estate, and right to receive the rents, is not irremovable from the parish where such estate is situated.

Cur. adv. vult.

On this day (the former opinions having been delivered two days before), Lord *Kenyon*, C. J. said, that the Court had looked more particularly into the case of *R. v. Hasfield*, and they were now all of opinion upon the authority of that case (a), which governed the present, that the settlement was in *Sedgfield*.

Both Orders quashed.

Wood & Uxor v. Baron.

1 East, 259. Feb. 6, 1801.

Under a devise to *A.* of all the testator's whole estate and effects real and personal, &c. "who shall hold and enjoy the same as a place of inheritance to her and her children or her issue for ever. And if it should so happen that *A.* should die leaving no child or children, or *A.*'s children should die without issue," then over; held, that *A.* took an estate-tail.

THE Master of the Rolls directed the following case to be made for the opinion of this Court.

Thomas Lowe, deceased, being seised in fee-simple of divers messuages, lands, and hereditaments in *Hindley* in *Lancashire*, on the 1st of *June* 1793, by his will duly made and executed, devised in the following words: "I give and bequeath to my loving wife *Ann Lowe* now living with me all my whole estate and effects real and personal whatsoever, to have, hold, and enjoy the same during her natural life, if she so long remain my widow, but if she should marry again, then she shall have 50 shillings a-year, to be paid to her from and out of my real and personal estate during her natural life, by my executors hereinafter named; then from and after the death of my aforesaid wife *Ann Lowe*, I give and bequeath to my daughter *Ann*, the wife of *Joseph Wood*, all my whole estate and effects real and personal, and whatsoever thereunto belongeth, and also all my household goods and furniture whatsoever and wheresoever, who shall hold and enjoy the same as a place of inheritance to her and her children or her issue for ever. And if it should so happen that my daughter *Ann* should die leaving no child or

(a) In the report of the same case in 2 Stra. 1132, it is stated, that the order was quashed as to the boy; for as to him he was tenant in fee of the 4*l.* per annum; and though it was not stated that he was actually on that spot, yet it was enough that he had such an estate in the parish from which he could not be removed. It is also to be collected from a MS. note of the late Mr. *Masterman*, that the boy was not living on his estate. It also appears that the settlement of the same pauper was afterwards disputed again between *Ryslip* and *Henden* parishes, 5 Mod. 416, and the principal question was, Whether *Ryslip* was concluded by the former order? but incidentally stress was laid on the circumstance of this pauper having a freehold at *Henden*. *Holl*, C. J. says, "Let a man be settled where he will, we are all of opinion he may go and live where he has an estate, and therefore that he might have gone to the place where he had a freehold."

"children, or if it so happen my daughter *Ann's* children should die without issue, then I order and direct that all my houses and lands, and also all my household goods and furniture, and all my other effects whatsoever shall be sold, and the money arising therefrom shall be divided in manner and form following; first, my nephew *John Bithell* of *Hindley* or his descendants, and *James Lucas* of *Aspiel* or his descendants, shall have the full sum of 100*l.*, that is 50*l.* each. Then I give to the two sons of *Eleanor Baron* five shillings each, and likewise to *Margaret* the daughter of *Alexander Lucas* the sum of five shillings, and likewise to *Joseph Wood* the sum of five shillings; and the remainder of the money shall be divided amongst my nephew *John Bithell*, and *Sibil* the wife of *James Platt*, and *Betty* the wife of *Richard Ashton*, and *Ann* the wife of *Robert Harrison*, or their descendants, and likewise *James Lucas* aforesaid, and *Eleanor* the wife of *James Baron*, and *Betty* the wife of *Lambert Ainscough*, or their descendants, which shall be equally divided amongst them share and share alike: and lastly, I nominate my wife *Ann Lowe*, and my nephew *John Bithell*, and *Alexander Winnard*, my lawful executors."

The testator died soon after the making of his said will without altering or revoking the same, leaving his widow *Ann Lowe* and his daughter *Ann Wood* him surviving. The testator's widow is since dead. At the time the testator made his said will, and at the time of his death, his daughter *Ann Wood* had one child only, which is now living; but she has since had several other children, all of whom are also now in being. The defendant purchased from the plaintiffs a part of the lands devised to the plaintiff *Ann*; and a bill was filed by the plaintiffs against him to compel a specific performance. The defendant by his answer offered to perform his part and pay the purchase money, if the Court should be of opinion that the plaintiff *Ann Wood* could make a good title. The question for the opinion of the Court was, Whether under the will of the testator *Thomas Lowe* his daughter the said *Ann Wood* took an estate-tail, or an estate for life only in the demised premises?

Holroyd for the plaintiff contended, that *Ann Wood* took an estate-tail, and consequently that by her and her husband suffering a recovery they could make a good title. For though according to *Wila's* case, 6 Co. 16, if there be a devise to one and his issue or children, and he then have issue living, the issue will take immediately, unless there be a manifest intent to the contrary to be collected from the whole will; yet that only holds where the estate is given to the children by express words; whereas here the gift is to *Ann Wood* alone, "who shall enjoy the same as a place of inheritance to her and her children," &c. There is, therefore, an express estate of inheritance given to her. Besides which the general intent of the testator would be defeated if the children took any estate; for as there are no cross remainders given, and they cannot be raised by implication between more than two, the remainder over would take effect on the death of any of them in dispersion of the rest of *Ann Wood's* issue. He also referred to *Doe v. Applin*, 4 Term Rep. 82, and *Doe v. Smith*, 7 Term Rep. 531, to shew that a particular must yield to a general intent where both cannot stand together.

Manley, contra, insisted that this case fell expressly within the rule laid down in *Wild's* case, that if a man devise land to A. and to his children and issue, and he have then issue, the issue shall take a joint estate for life with A. [Lord *Kenyon* observed, that there were other words here; namely, that *Ann Wood* should enjoy the estate as an inheritance to her and her children or issue for ever.] If those words were construed to give *Ann Wood* a fee, it would make the limitation which follows an executory devise. Lord *Kenyon*. As an executory devise it would be too remote, being after an indefinite failure of issue]. It is merely after failure of issue of the first taker, and therefore not too remote; for in one event it is, "if *Ann* should die leaving

"no child or children." In *Porter v. Bradley*, 3 Term Rep. 143, the devise was "to one and his heirs and assigns for ever," and if he die leaving no issue behind him, then over; and there the limitation over was holden good by way of executory devise. So in *Roe v. Jeffery*, 7 Term Rep. 531, after a devise to *T. F.* in fee the testator added, "and in case *T. F.* should depart this life and leave no issue, then to *E. M.* and *S.*, or the survivor or survivors of them share and share alike." This latter was holden a good executory devise.

LORD KENYON, C. J. In cases of this sort one spells as it were every word in order to get at the real intention of the testator. In *Porter v. Bradley* the words were, "leaving no issue behind him." In *Roe v. Jeffery* the words were, "in case he should depart and leave no issue," and the limitation over was of estates for lives to persons then *in esse*. These circumstances shewed that the testators in the respective instances meant to confine the limitations over to the event of a dying without issue at the time of the death of the first taker. But it is a general uncontrollable rule, that that which may take place as a remainder shall never take place as an executory devise: and at present it appears to me that *Ann Wood* took an estate-tail: however, we will consider the case, and certify our opinion.

Afterwards the following certificate was sent to the Master of the Rolls:

This case has been argued before us by counsel; we have considered it, and are of opinion, that under the will of the testator *Thomas Lowe*, his daughter *Ann Wood* took an estate tail in the premises devised to her by the said will.

KENYON.
N. GROSE.
S. LAWRENCE.
S. LE BLANC.

16th Feb. 1801.

Goodtitle on the demise of George Sweet v. John Bidlake Herring, Joseph Hornebrook, and John Hittow.

1 East, 264. Feb. 6, 1801.

Under a devise to *A.* for her natural life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of *A.* to be begotten, severally, successively, and in remainder one after another according to seniority, &c. the elder of such sons and the heirs male of his body being always preferred before the younger of such son and sons and the heirs male of their bodies, and in default of such issue, to the daughter and daughters of the body of *A.* as tenants in common in tail, remainder over; held *A.* only took an estate for life, and that the words *heirs male of her body* were explained by the subsequent words to mean first and other sons.

THIS was an ejectment for certain manors, messuages, and land lying in the parishes of *Eggloskerry North* and *South Petherwyn*, and several other parishes in the county of *Cornwall*, under a demise laid on the 28th of May, 1800. At the trial before *Thompson*, B. at the last assizes at *Bodmin*, a special verdict was found, stating in substance, that *Elizabeth Long* at the time of making her will, and at her death, was seised in fee of the demised premises, which she became entitled to on the death of her late brother *John Spaccot Long*; and being so seised, on the 11th of December, 1763, made her last will in writing of that date, duly executed and attested to pass lands, whereby she devised as follows: As for and concerning all manors, messuages, tenements, lands, hereditaments, and premises, advowsons, &c. and rights of patronage whatsoever, and wheresoever whereof she should be possessed or entitled unto at the time of her decease, situate, lying and being in the several counties of *Devon*, *Cornwall*, the county of the city of *Exeter* or elsewhere, she gave and devised the same, with all and singular their, each and every of their rights, members, hereditaments, and appurtenances what-

soever, unto *Oliver Baron* and *George Sweet* (the lessor of the plaintiff) and their heirs, for and upon the several uses and trusts thereafter limited and declared, (viz:) To the use of and in trust for her sister *Margaret* the wife of *C. Davie* and her assigns during her natural life, without impeachment of waste, remainder to the same trustees to preserve contingent remainders; and from and after her decease, then to the use of and in trust for the heirs male of the body of the said *Margaret Davie* to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body lawfully issuing being always preferred, and to take before the younger of such son and sons and the heirs male of his and their body and bodies; and for want and in default of such issue then to the use of and in trust for all and every the daughter and daughters of the body of the said *Margaret Davie* to be begotten, to be equally divided amongst them, if more than one, share and share alike, to take as tenants in common and not as joint-tenants, and of the several and respective heirs of the body and bodies of such daughter and daughters; and in default of such issue then to the use of and in trust for her cousin the said *George Sweet* and his assigns for and during the term of his natural life without impeachment of waste, and from and after the determination of that estate then to the use and behoof of him the said *Oliver Baron* and his heirs during the natural life of the said *George Sweet*, upon trust to preserve contingent remainders; and from and after the decease of the said *George Sweet*, then to the use of and in trust for the heirs male of the body of the said *George Sweet* to be begotten, severally, successively, and in remainder one after another as they and every of them should be in seniority of age and priority of birth, the elder of such sons and the heirs male of his body lawfully issuing being always preferred before the younger of such son and sons and the heirs male of his and their body and bodies; and for want and in default of such issue, then to the use of and in trust for all and every the daughter and daughters of the body of the said *George Sweet* to be begotten, to be equally divided amongst them (if more than one) share and share alike, as tenants in common and not as joint-tenants, and of the several and respective heirs of the body and bodies of such daughter and daughters; and in default of such issue, then to the use and behoof of the right heirs of her the said *Elizabeth Long* for ever, and to and for no other use, end, intent, or purpose whatsoever.

On the 26th of *June* 1769, the testatrix died, whereupon *Margaret Davie* entered and was seised, &c. On the 1st of *January* 1775, *Charles Davie* died, leaving *Margaret* his wife the devisee him surviving, who by indentures of lease and release of the 5th and 6th of *December*, 1775, made a tenant to the *præcipe* and suffered a common recovery, and afterwards by her will dated 20th of *October* 1786, duly executed and attested to pass lands, devised the premises in question to the defendant *John Bidlake* in fee; and afterwards died on the 16th of *May* 1799, without ever having had any issue; after whose death *Bidlake* entered and was seised, and in *Hilary* term 40 Geo. 3, levied a fine with proclamations; and after such fine levied, and within five years after the death of *Margaret Davie*, and within one year before the commencement of this suit, *George Sweet* the lessor of the plaintiff (*Oliver Baron* being then dead) entered upon the premises and ejected the said *John Bidlake*, and demised the same, &c.

Tripp, for the lessor of the plaintiff, insisted that *Margaret Davie* took only an estate for life, with remainder to her children as purchasers. Plain words giving an estate tail will indeed prevail, unless there be a plain intent only to give an estate for life. Now here is an express limitation of the estate in strict settlement. First, there is an express estate to her for life, then to trustees to preserve contingent remainders; then indeed there is a limitation to the heirs male of her body, but the testatrix in the same sentence pro-

ceeds to point out what heirs male, namely, sons, in succession, the elder of such sons, &c. to be preferred; and therefore designating them as purchasers to take in their own right, and not by descent from their mother. Besides, if the limitation to the heirs *male* of the body of *Margaret Davie* is to give her an estate tail, the subsequent limitation to the daughters must be obliterated; for it cannot be contended that those words would give her an estate in *tail general*, but only in *tail male*. And even if she took an estate in *tail general*, the daughters would take in a different way from what the testatrix designed: for she has directed them to take as tenants in common, which they would not otherwise do, but as coparceners. He also cited *Lowe* or *Law v. Davis*, 2 Ld. Ray. 1561; 2 Stra. 849. & Fitzg. 112, as in point: that was a devise to *B.* and his heirs lawfully begotten, viz. the first, second, and every other son successively lawfully to be begotten; and the heirs of the body of such first, second, and every other son, &c. according to seniority; and in default of such issue, to the devisor's own right heirs. There it was holden that the latter words explained the former, and that *B.* took only an estate for life and not in tail. That case was even stronger than the present; for there was no express estate for life, given to *B.* as in this case to *M. D.* So in *Ginger v. White*, Willes, 348, the devise was to *A.* for life, remainder to the male children of *A.* in succession and their heirs, and in default of such male children to the female children and their heirs, and in case *A.* died without issue, then over; and held that *A.* took only an estate for life. And there Lord C. J. *Willes* speaking of *Legatt v. Sewell*, 2 Vern. 551, which he observes was the only case which had the least resemblance to the contrary, (and from which judgment *Tracy*, J. dissented,) says, that there the words were "heirs of the body," which *ex vi termini* even in a deed would create an estate tail. But he adds, that if the first words had been "issue" or "children," all the Judges were of opinion that *W. Legatt* would only have had an estate for life. And that they were on this rule, that where in the beginning of a will an express estate is given, it shall not be afterwards altered by *implication*, though it may by *express words*. And then he distinguishes that case from *Law v. Davis*, for that in the former there were no express words to alter the estate first given, as there were in *Law v. Davis*. The same reasoning, therefore, will serve to distinguish this from the case of *Legatt v. Sewell*. Upon that distinction also the case of *Sayer v. Masterman*, Ambl. 344, turned, where the first taker took an estate tail, it being devised to him *and the heirs of his body*, the males having preference and succeeding according to their births; which latter words the Court said expressed no more than what the law directs. But here the legal descent is altered. That case, however, was decided without adverting to the case of *Ginger v. White*, which though determined before was not published till afterwards.

Lens, Serjt., contra, contended that *Margaret Davie* took an estate tail by the words of the will, and from the general intent of the testatrix. The words used here are materially different from those in *Law v. Davis*. There the testator expressly declared what "heirs lawfully begotten" he meant, viz. "the first, second, and every other son," &c. whereas here the estate is limited to "the heirs male of the body to be begotten severally, successively, and in remainder one after another," &c. which is no more than the law would have done. It is true, that words used in their usual legal acceptation in the first part of a will may be controlled by subsequent words, and the whole will must be read together; but then the intention of the testator to control the former words must be manifest and express. Now "heirs of the body" are words peculiarly appropriated to carry an estate-tail, and they have never been construed to be words of purchase unless such an intent has been positively expressed. If the subsequent words, "the elder of such sons," &c. being always to be preferred to the younger of such son and sons, &c. must be taken to mean the son and sons of *Margaret Davie*, as an explanation of

what was meant by the antecedent words, "heirs male of the body;" then indeed the case would be governed by *Law v. Davis*; but they do not necessarily import that, and must rather be taken to mean son and sons in succession at all times during the continuance of the male descendants of *Margaret Davie*. [Lord *Kenyon*. Words of purchase cannot be applied to the second generation beyond those *in esse*.] In *Law v. Davis* the explanatory words "son and sons," &c. expressly referred to the sons "of the body of the said *Benjamin*," the first taker. And so it was in *Ginger v. White*, and *Lisle v. Gray*, 2 Lev. 223. Pollex, 582. But here the words "such son and sons," &c. are not expressly said to be son and sons of *Margaret Davie*. Next, the words "severally, successively, and in remainder," &c. do not stand in the way of construing this to be an estate tail in the first taker, as was holden in *Jones v. Morgan*, 1 Bro. Ch. Cas. 206. [Lord *Kenyon*. There were no superadded words of limitation in that case to the devise to the heirs male. I argued the case.] But it shews that those words alone will not prevent an estate tail going to the first taker. *Sayer v. Masterman*, Amb. 344, is to the same effect. In *Ginger v. White* the devise was to the male children of the first taker in succession, which word *children* is naturally a word of purchase: but here the devise is to the heirs male of the body, which are naturally words of limitation. Then the subsequent limitation to the daughters is objected as inconsistent with this construction: but if the general intent will best be effectuated by giving *Margaret Davie* an estate in tail male, the particular intent must give way. That difficulty, however, may be gotten rid of in two ways, either by *Margaret Davie* taking an estate in tail general, or by her taking an estate in tail male, with remainder in tail general to her daughters. And though the devise to the daughters might thereby lapse in the event of their dying before it vested, yet that would be better than cutting off the succession of any of the heirs male of *Margaret Davie* who were intended to be preferred, which would be the case if the eldest son died, leaving a son in the lifetime of the testatrix. Neither is there any provision made in the will for the daughters of *M. D.*'s sons. Upon the whole, although there are inconveniences both ways, yet by giving her an estate tail the general intent may be better effectuated, according to the doctrine in *Roe d. Dodson v. Grew*, 2 Wills. 322, which was, that the remainder over should not take effect till failure of the issue of *M. D.*

Tripp, in reply, observed that the cases of *Roe v. Grew*, *Robinson v. Robinson*, *Doe v. Applin*, and others of the same class, only shew, that where there is a manifest intent upon the whole will that all the issue of the first taker should take before the estate went over, and there were no words to effectuate that intent without giving an estate tail to the first taker, that construction should prevail: but here there are sufficient words to carry the apparent intent into effect, without having recourse to such an artificial construction. No satisfactory answer has been given to the objection, that the limitation to the daughters will be struck out of the will by giving *M. D.* an estate in tail male, (for there is no pretence for her taking an estate in tail general). And this case is even stronger in that respect for letting all the limitations stand than *Law v. Davis*; for there the heirs general might have come in notwithstanding the first taker had an estate tail; but here the daughters will be excluded by such a construction. It would be a new and unnatural construction to give the ancestor an estate in tail male, with a subsequent limitation to the daughters as purchasers: and unless the testatrix had so positively expressed it, the Court would not imply such an intention. Here the eldest son of *M. D.* was so described, because not being *in esse* he could not be otherwise designated. It plainly was not the intent of the testatrix to enable *M. D.* to destroy all the subsequent limitations to the objects of her bounty.

LORD KENYON, C. J. I have not the smallest doubt upon this case. The intention is most obvious to give the first taker only an estate for life; but if

that intention could not be carried into effect without shaking a positive rule of law I should certainly bow to the decisions. The case of *Colson v. Colson*, 2 Atk. 246, went on that ground; and so afterwards did *Perryn v. Blake*, 4 Burr. 2581, in the Exchequer-chamber; where the Judges thought, that after the rule of law in *Shelly's* case had governed so many subsequent decisions, however imperfect in itself as a rule for construing the intention of a testator, it was necessary to abide by it. That rule, however, is only established to the extent in which it is to be found in *Shelly's* case, 1 Co. 104 b, to this effect, that if an estate of freehold be given to a man, and either mediately or immediately in any part of the same instrument an estate is limited to the heirs of his body, the latter limitation will unite with the former, and give him an estate-tail. But it never has been decided that those words might not be otherwise explained in the will by the testator himself. They were so explained in *Law v. Davis*. There the question was, Whether the words "heirs lawfully to be begotten" could not be explained by the subsequent words to mean heirs of a certain description? In other words, Whether the testator could not say "by heirs lawfully to be begotten I mean the first and other sons successively," &c. of the first taker. Of this there could be no doubt. In former times, indeed, greater strictness was attributed to the meaning of the words "heirs of the body." The estate which was the subject of dispute in the case of *Law v. Davis* came afterwards to a gentleman who was not perfectly satisfied with the decision, and would have it canvassed again. His doubts were founded upon an old opinion which he had discovered of Lord *Holt's*, that the words "heirs of the body" were so positive to give an estate-tail to the first taker that they could not be gotten rid of by subsequent words. That opinion I have seen; but it was certainly too straight-laced a construction: and nobody has ever since doubted but that the case of *Law v. Davis* was rightly decided. That case, however, if it wanted confirmation, has been fortified by the subsequent decision in *Doe d. Long v. Laming*, (of which his lordship read a note of Mr. *Filmer's*, taken, as he said, more accurately than that by Sir *Jawes Burrow*.) The Court there clearly thought, that the subsequent words "as well females as males" shewed that the testator meant the words "heirs of the body," &c. to be words of description of the persons whom he intended should next take, and not words of limitation. I well remember the case of *Jones v. Morgan*. There were no words of limitation superadded to the devise to the heirs male, which has been always holden to be of great weight in cases of this sort. The decision in this case, however, is principally governed by the case of *Law v. Davis*, and *Doe v. Laming*, which fortifies it. It is unnecessary to go through all the other cases. *Bagshaw v. Spencer* establishes the same principle. *Lisle v. Gray* is stronger still, because it was a construction on a deed. Also *Coulson v. Coulson*, and other cases might be mentioned. All conspire to shew that *Margaret Davie* took only an estate for life, and not in tail. If it had come within the principle of the case of *Roe d. Dodson v. Grev*, where a particular intent could not by law take effect consistently with other parts of the will, we must have gone *cy pres* and given effect to the general intent: but that class of cases does not apply to the present.

Grose, J. The only question is, Whether the words "heirs male of the body of *M. D.*" &c. can, by the subsequent words, be explained to be used as words of purchase? That must be determined by considering what the intent of the testatrix was, and whether such intent can be effectuated within settled rules of the law. The intent is most obvious that *M. D.* the mother should only take a life-estate; it is so declared in express terms. Nevertheless, if it were shewn to be inconsistent with the whole plan of the will that she should take no greater estate, there are subsequent words large enough to have given her an estate-tail: but here it is consistent with the whole will that the words "heirs male of the body," &c. should be restrained by what follows. The case of *Law v. Davis* is rather stronger than the present, and

at least justifies us in holding that the words "heirs male of the body" may be restrained to mean words of purchase. Here too there are words of limitation added to the devise to the heirs male, &c. which has always been considered as a strong ingredient in cases of this sort. The case of *Law v. Davis* is supported by that of *Doe v. Laming*; and to these may be added *Bagshaw v. Spencer*, 1 Ves. 142, which I think goes the whole length of the present case. Therefore, I think we are fully warranted in giving effect to the intention by deciding that *Margaret Davie* took only an estate for life.

LAWRENCE, J. The question is, Whether "heirs male of the body of *Margaret Davie*" is descriptive of the persons whom the testatrix afterwards calls "son or sons?" Of the intention there can be no doubt. She first gives *M. D.* an express estate for life, without impeachment of waste, then to trustees to preserve contingent remainders, then after *M. D.*'s decease to the heirs male of her body to be begotten severally, successively, and in remainder one after another, &c. All this was unnecessary if the testatrix meant to give *M. D.* an estate-tail. But then she goes on, "the elder of *such sons* and the heirs "male of his body to be preferred before the younger of *such son and sons*;" evidently meaning the same persons whom she had before described as heirs male of the body of *M. D.* Therefore, this falls directly within the case of *Law v. Davis*; and is the same as if the testatrix had said "by *heirs male of the body* I mean the eldest and other son and sons of *M. D.*;" and if she had said so in as many words, it cannot be questioned but that the former words must have had that construction put upon them. Now the words made use of are in effect the same. Then the testatrix proceeds to give an estate to the *daughters* of *M. D.* in the same manner. That also shews that by the words "*such son or sons*" she meant the same persons whom she had before described as the heirs male of *M. D.* For she first provides for the sons and then for the daughters of the first taker. It is no answer to say, that by this construction, if the eldest son of *M. D.* had died in the lifetime of the testatrix leaving a son, the devise would have lapsed, and the grandson been disinherited; for if the obvious meaning of the will be that *M. D.* should only take for life, we cannot enlarge that estate in order to prevent a possible inconvenience.

LE BLANC, J. There is no rule of law to prevent the words "heirs male of the body" from being words of purchase, if they are clearly so intended to be. Now here the testatrix expressly says, "*such son and sons*," plainly referring to the same persons she had before described as *heirs male of the body*, &c. and pointing out what estate they were to take. And having provided for the sons, she proceeds to provide for the *daughters* of *M. D.*, which confirms the construction put upon the former words. Therefore, I am clearly of opinion that *Margaret Davie* took only an estate for life, and that the sons took as purchasers(1).

Lowndes v. Lowndes.

1 East, 276. Feb. 6, 1801.

Application to set aside awards, though for objections appearing on the face of them, must be made within the time limited by the 9 & 10 W. 3. c. 15.

A RULE was obtained to shew cause why an award should not be set aside for defects appearing upon the face of the award itself; against which

(1) In a subsequent case in the *Common Pleas*, resembling the case in the text in several respects, the Judges thought that there did not appear upon the whole will together, sufficient indications of the testator's intention to restrain the legal effect of the words "heirs male of the body," and to convert them into words of purchase. *Poole v. Poole*, 3 Bos. & Pull. 620. Vide *Lessee of Findley v. Riddle*, 3 Binn. 138, where the principal authorities are collected.

Erskine now shewed cause, and objected to the court entering into the consideration of the defects stated upon the award, because the application had not been made within the time limited by the stat. 9 & 10 W. 3. c. 15, which was before the last day of the term next after the award shall be made and published; and more than that period had now elapsed.

Gibbs, in support of the rule, said that that limitation only applied where the award was impeached on the ground of corruption or undue practice, which was matter extrinsic to the award itself, and not where the objection appeared upon the face of it. Besides, the award having been made a rule of court gave the court jurisdiction over it independent of that statute. That the reason for making the present application was, because the parties were litigating upon the subject matter in the Court of Chancery, and it was thought that the award might be considered as conclusive unless it were set aside, although plainly defective.

The Court were of opinion that the application came too late after the period limited by the statute; and

LAWRENCE, J. added, that in *Pedley v. Goddard*, 7 Term Rep. 73, the distinction was taken, that if the party in whose favour the award was made applied for an attachment for non-performance, it was competent to the other to enter into legal objections appearing upon the face of the award, even after the period limited by the stat. 9 & 10 W. 3. But it was there taken for granted, that no application could be entertained for setting it aside, however voidable on the face of it, unless the party applied in time. And the reason why it was permitted to make the objection in the former case was, because upon a motion for an attachment the party would be without remedy if the attachment were granted, notwithstanding the illegality of the award; whereas if the party were left to his remedy by bringing his action on the award, it would be competent to the defendant to take advantage of any illegality appearing upon the face of it.

Rule discharged(a).

The King v. Edwards.

1 East, 278. Feb. 7, 1801.

A conviction on the stat. 5 Geo. 3. c. 14, for fishing without consent of the owner "in part of a certain stream which runneth between *B.* in the parish of *A.* in the county of *W.* and *C.* in the same parish and county," quashed, because it did not appear that the intermediate course of the stream between the two termini in which the offence was alleged to be committed, was in the county of *W.* and within the jurisdiction of the convicting magistrate.

THE following conviction was removed into this court by *certiorari*:

Warwickshire. Be it remembered, that on the 27th of May, 40 Geo. 3, at *Aston* in the county of *Warwick*, *Thomas Chattock* of, &c. came before me *Rev. B. S.* one of the justices assigned to keep the peace in and for the said county of *W.* &c. and upon oath, &c. gave me to understand, that on the 25th of May last past, the defendant did fish with a net in a certain river or stream called *Tame*, in that part of the said river or stream which runneth between *Bromford Forge* in the parish of *Aston* in the county of *Warwick*, and *Castle Bromwich* in the said parish of *Aston* in the said county; of the fishery of which part of the said river or stream *Lord Bradford* and *H. Legge*, Esq. then and there were owners, with an intent and attempt then and there to take, kill, and destroy the fish in the said river or stream so situate as aforesaid, against the form of the statute, &c. and without the consent of

(a) Vide *Zachary v. Shepherd*, 2 Term Rep. 781, where the like construction was put on the stat. of 9 & 10 W. 3, though there was no charge of corruption or undue practice, but that the award was made on insufficient materials.

the said Lord *B.* and *H. L.*, or either of them, then and there owners of that part of the fishery of the said river or stream; he the defendant not then and there having any just right or claim to take, kill, or carry away any of the fish in that part of the said river or stream, or any just right to attempt to take, kill, or destroy any fish in that part of the said river or stream so situated as aforesaid, the said part of the said river or stream aforesaid wherein the said fish were so intended and attempted to be taken, killed, and carried away by the defendant not being then and there in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling house, but in other inclosed grounds then and there being private property: and that the said Lord *B.* and *H. L.* then and there were the true and lawful owners of that part of the said river and stream, and of the fishery thereof; and that the same is their private property; and that the defendant had not then and there their licence and consent, or the licence and consent of either of them. And whereas the said defendant, after having been duly summoned in this behalf to appear before me the said justice this 30th of *May* instant, &c. at *Aston* aforesaid, in the county aforesaid, appeareth and is present in order to make his defence against the said charge contained in the said information, and having heard the same read, is asked by me the justice if he can say any thing for himself why he the defendant should not be convicted of the offence charged upon him in form aforesaid, who pleadeth and saith he is not guilty of the said offence; nevertheless on the said 30th *May* instant, &c. at, &c. *J. F.* a credible witness cometh in his proper person before me the same justice, and upon his oath, &c. deposeth and saith, that on the 25th of *May* last past, in the year aforesaid, he saw the defendant with one *W. S.* drawing a draught net in the said river or stream called *Tame*, which runneth between *Bromford Forge* in the parish of *Aston* in the county of *Warwick*, and *Castle Bromwich* in the said parish of *Aston* in the said county of *Warwick* aforesaid, to take, kill, or destroy the fish, or attempt to take, kill, or destroy the fish, in the said part of the said river or stream; and that the said part of the river or stream is not in any park or paddock, garden, orchard, or yard adjoining or belonging to any dwelling house, but in other inclosed grounds then and there being private property; and that Lord *B.* and *H. L.* are the true and lawful owners of the fishery of the said part of the said river or stream; and that the defendant had not then and there the licence and consent of the said Lord *B.* and *H. L.*, or either of them, to take, kill, or destroy, or attempt to take, kill, or destroy the fish in the said part of the said river or stream; and that he the defendant had not then and there any just right or claim to take, kill, or carry away any of the fish in that part of the said river or stream so situated as aforesaid, or any just right or claim to attempt to take, kill, or destroy any of the fish in that part of the said river or stream so situated as aforesaid. It is, therefore, by me the said justice upon the evidence of the said *J. F.* adjudged, that the defendant is guilty of the said offence, and that he the said defendant be, and he is hereby convicted of the said offence, according to the form of the statute aforesaid; and I the justice do award and adjudge, that for the offence aforesaid he the defendant hath forfeited the sum of *5l.*, to be paid as the statute directs to me the said justice for the use of the said Lord *B.* and *H. L.*, as owners of the fishery of the said river or stream so situated as aforesaid where the said offence was committed.

Clarke took several objections to the conviction. 1. It does not appear that the offence was committed in the county of *Warwick*. It is only stated, that the defendant fished "in that part of the river or stream called *Tame* "which runneth between *Bromford Forge* in the parish of *A.* in the county "of *W.* and *Castle Bromwich* in the said parish of *A.* in the said county." *Non constat* but that, though both the *termini* are in the county of *W.*, yet that the part of the stream running between them in which the defendant fished may be in another county, out of the jurisdiction of the convicting magis

trate. Such a circumstance is not unusual. 2. It is not stated, that the complaint was made on behalf of the owners of the fishery, or by their consent. In *R. v. Corden*, 4 Burr. 2279. a conviction for the same offence was quashed, because it neither appeared to have been made on the complaint of the owner, nor that the fact was done without his consent. Here indeed there is the allegation that it was done *without* the consent of the owners, but it does not appear to have been done *against* their consent; and as the view of the several acts of the 22 & 23 Car. 2. c. 25. s. 7., the 4 & 5 W. & M. c. 23. s. 5., and the 5 Geo. 3. c. 14, s. 3. was to make compensation to the owner for the private injury by giving him the penalty, the information can only be laid before the justice by or on behalf of the owner of the fishery, which it is not so stated to be in this instance, and therefore there does not appear to be any jurisdiction in the convicting magistrate to take cognizance of such a complaint by a common informer. By the last-mentioned act the owner has an option either to prosecute before a magistrate for the penalty, or to bring his action for it, which option will be taken away if a third person may elect for him against his consent to lay the information before a magistrate. 3. The evidence stated to prove that the fishing was without the consent of the owners ought not to have been received, since no third person could swear positively to that fact. 4. The defendant is charged with having fished in the river "with an intent and attempt to take, kill, and destroy the "fish," &c., and the justice adjudges him guilty of *the offence aforesaid*. Now the stat. of Geo. 3, before mentioned, on which the conviction is founded, makes it an offence to take, kill, or destroy fish, or to attempt to do so. The information, therefore, in describing the offence ought to have pursued the words of the statute; but neither that nor any other of the statutes on this subject describe the offence as here stated, and it is left uncertain of what offence the defendant is convicted. *R. v. Mallinson*, 1 Burr. 679; *R. v. Trelawney*, 1 Term Rep. 222; and *R. v. Salomons*, Ib. 249.

Balguy, contra, after attempting to answer the first objection by saying, that the Court would presume that the river was in the same county as the two *termini* mentioned between which it flowed, and which were stated to be in the county of *Warwick*, was proceeding to answer the other objections; but

The Court said, it was not necessary to enter into the subsequent objections, because the first was decisive. They could not presume that the place where the offence was committed was within the jurisdiction of the convicting magistrate; but it must expressly so appear. Now it did not follow that the intermediate course of the stream was in the same county with the two *termini* mentioned: the fact was often otherwise.

Conviction quashed.

'The King v. The Inhabitants of Islington.

1 East, 288. Feb. 7, 1801.

The statute 35 Geo. 3. c. 101. s. 4, which provides that after the passing of the act, no person who *shall come* into any parish shall gain a settlement by being rated to any tenement under 10l. a-year value, extends to persons who were in the parish at the time of the passing the act.

TWO justices by an order removed *William Oakley*, his wife and children, from the parish of *West Walton* to the parish of *Islington*, both in the county of *Norfolk*. The sessions on appeal confirmed the order, subject to the opinion of this Court, on a case stating, that the pauper being legally settled in the parish of *Islington*, was resident from *Michaelmas* 1794 to *Michaelmas* 1796 in the parish of *West Walton*, in a tenement of the yearly value of 8l. By an assessment dated the 25th August 1795, for the relief of the

poor of the parish of *West Walton* from the preceding *Lady-day* to the following *Michaelmas*, the pauper was assessed in respect of the aforesaid tenement at the rent of 7*l.* a-year, and duly paid the said assessment.

By the stat. 35 Geo. 3. c. 101. s. 4. it is enacted, "that from and after the passing of this act no person or persons whatsoever, who *shall come* into any parish, township, or place, shall gain a settlement in such parish, &c. by being charged with and paying his or their share towards the public taxes or levies of the said parish, &c. for and on account or in respect of any tenement not being of the yearly value of 10*l.*"

The question for the opinion of the Court was, Whether the pauper being *resident* in the parish of *West Walton* previous to the 22d of *June* 1795 (the day on which the said act took effect), was enabled to gain a settlement by payment of the rate which was made in the subsequent month of *August* as from the preceding *Lady-day*?

Wood and *Marsh* in support of the order of sessions were stopped by the Court.

Fulton, contra, contended shortly, that the statute in question was intended to operate prospectively upon those only who *should come* into any parish *after the passing of the act*; but did not preclude the gaining of a settlement by means of rating and paying, even after the act, by those who were inhabitants of the parish before. This is to be collected from the special wording of the law; and if the legislature had intended to make the operation of it general, they would have enacted that no person after the passing of the act *shall gain* any settlement by being charged, &c. But

Lord KENYON, C. J. said, it was very clear that the legislature meant that no person should gain a settlement after the passing of the act by being rated and paying; the words who *shall come* into any parish mean who *shall inhabit* there. It was intended to make an end of this head of settlement law in future(a).

Per Curiam,

Order of Sessions confirmed(b).

The King v. The Inhabitants of St. Helen Stonegate.

1 East, 285. Feb. 7, 1801.

The pauper, an apprentice, being about to marry, told his master, that he wished to provide and work for himself, to which the master consented, and said he might do the best he could for himself; but nothing was said about the indentures, and they were not in fact delivered up or cancelled; the pauper afterwards engaged to work with another master, who told the original master that he had got the pauper at work, to which the original master answered, "I am glad of it, he was a bad lad and I could make nothing of him:" held this was not such a consent to the particular service as would confer a settlement in the parish where the pauper then lived with the second master.

TWO justices by an order removed *Thomas Chapman*, his wife and family by name, from the parish of *All Saints Peaseholme* to the parish of *St. Helen Stonegate*, both in the city of *York*. The sessions on appeal confirmed the order, subject to the opinion of the Court on the following case.

(a) The repealing clause in the 35 Geo. 3. c. 101, adopted the style of the enacting law of the 3 W. 3. c. 11, s. 6. "If any person who *shall come to inhabit* in any town or parish shall be charged with and pay his share towards the public taxes or levies of the said town or parish, he shall be adjudged to have a legal settlement in the same," &c. The same construction must have prevailed on these words at the time of passing that act as in the present case; otherwise no person previously inhabiting in a parish could have gained a settlement therein by rating and paying, though a new inhabitant might have so done; a distinction which could not have been within the contemplation of the legislature.

(b) There was another case in the paper of *The King against The Inhabitants of Alverthorpe with Thornes*, in the West riding of the county of *York*, which involved the same question, and underwent the same determination.

The pauper, on the 1st of *January* 1786, was bound apprentice for seven years to *T. Mawman* of *Thirsk*, bricklayer, with the consent of his brother *W. Chapman*, his father and mother being then dead. The pauper continued with *T. Mawman* three years and upwards at *Thirsk*, and then ran away. *W. Chapman* his brother went back with the pauper to *Thirsk* to settle matters between him and his master for resuming the service, which could not be effected: but the pauper was assigned by parol to *W. Chapman*, with whom he afterwards lodged about three years, [except during the absence of a few months with *W. Chapman's* consent,] and in the last two years of that time slept in the parish of *St. Helen Stonegate*. During the time he was with *W. Chapman*, the pauper worked under his authority, and generally along with him, for several masters, [*W. Chapman* being a journeyman bricklayer during the whole term of the indenture]. The pauper's wages were received and applied by *W. Chapman* towards his maintenance, the pauper being bad of sight and earning but little; and among other masters they worked both together for *T. Penneyston* during three months commencing from *November* 1789. About *March* 1792, the pauper being about to marry, applied to *W. Chapman*, and told him he wished to work and provide for himself; to which *W. Chapman* consented, and said he might do the best he could for himself, and did not afterwards consider the pauper as his apprentice; but the indenture was neither delivered up nor cancelled, nor any thing said respecting it. In the same month, and about three quarters of a year before the expiration of the term of the apprenticeship, the pauper applied for work to the said *T. Penneyston*, who employed him in bricklayers' work, and paid him weekly wages. About a month after he had so employed the pauper, *T. Penneyston* met with *W. Chapman* and told him he had got his brother at work, to which *W. Chapman* replied, "I am glad of it; he was a bad lad, and I could make nothing of him." The pauper continued to work with *T. Penneyston* for five months after this conversation, and during the last three months of that time slept in the parish of *St. John Delpike in York*; which, it was contended on the part of the appellants, discharged the prior settlement (if any) in *St. Helen Stonegate*. The indenture was not given up by *W. Chapman* to the pauper till after the time expired, and was produced uncanceled at the hearing of this appeal.

Holroyd, in support of the order of sessions, relied on the case of *Rex v. Crediton(a)* as in point. There the master having before told his apprentice that he had no further employment for him, and he might go where he pleased, was afterwards informed by the apprentice that he was going to one *Underhill*, to which he answered that the apprentice might go there or where he pleased; and this was deemed not to be such a particular consent as would enable the apprentice to gain a settlement by serving *Underhill*. This was a mere indiscriminate leave to serve whom the pauper pleased, which is not sufficient in these cases. In *Rex v. Sanford*, 1 Term Rep. 281, it was said there must be an express consent of the master to the particular service, and that a mere recommendation was not sufficient; and that where the parties acted under an idea that the indentures were at an end, although they were not in fact delivered up or cancelled, no settlement could be gained as an apprentice under them.

Law, contra, said, that the consent given here was sufficient within the cases decided. In *Rex v. Bradninch*, T. 21 Geo. 3, 2 Const. 594, the master telling the pauper, that he thought the place he was in a good place for him, and that he hoped he would continue in it, was holden a sufficient assent to the particular service; and so in *Rex v. St. Mary Lambeth*, Ib. 595, the giving a character of the apprentice to one who applied, though the master had before told

her that she was no longer his apprentice, and that she might go and look out for another place ; but had not delivered up or cancelled the indentures.

The Court said, that this case was governed by the decision in *Rex v. Crediton*, which was expressly in point.

Order of Sessions confirmed.

The King v. The Parish of Edington.

1 East, 288. Feb. 7, 1801.

A cottage leased for 99 years determinable on lives, purchased by the pauper's wife before marriage, was in the lifetime of her first husband conveyed by them to a trustee in trust that he should by sale or mortgage raise 10*l.* (for the benefit of the parish by whom the family had been before relieved to that amount) interest and charges, and after payment of the same, in trust to re-assign the premises. The parties always continued in possession ; and it did not appear whether the money were ever paid ; or what was the value of the cottage. Held that on the death of the first husband, the pauper who married the widow gained a settlement by residing forty days in the cottage of which she had retained the possession.

TWO justices by an order removed *William Bailey*, together with his wife and children, by name, from the parish of *Edington* to the parish of *Urchfont*, both in the county of *Wilts*. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case : *Martha Merrit*, spinster, being in possession of a cottage in *Edington*, which had been granted to one *Clement Whiting* by lease for a term of 99 years originally determinable on three lives, of whom one only was living, purchased a reversionary interest in the cottage for a further term of 99 years to commence at the determination of the first term, but determinable with the lives of herself and her brother *H. Merrit* ; and a lease in reversion was accordingly made to her. *Martha* having married one *William Darling*, by indenture of the 7th of July 1776, made between *W. and M. Darling* of the one part, and *J. Price of Edington* of the other, after reciting the said lease, and that *W. Darling* was indebted to the officers of *Edington* in 10*l.* and upwards for monies paid, laid out, and expended in the maintenance of *Martha* the wife, and the children of the said *W. Darling*, and that it was agreed to make a security of the said premises to *Price* as a trustee for the parishioners for the payment of the said 10*l.* and interest ; it was witnessed, that for securing the 10*l.* and interest the said *W. and M. Darling*, for the considerations therein mentioned, did assign to *Price* the cottage and premises, in trust that *Price* should by sale or mortgage of the said premises, and by the receipt of the rents and profits thereof, or by some or one of those ways and means, raise the said 10*l.* and interest thereof, together with such costs and charges as should attend raising the same, and after payment of the said sum of 10*l.* and such costs and charges as aforesaid in trust to re-assign the said premises to the said *W. and M. Darling* or one of them, or such other person as should be entitled to the premises, or such parts thereof as should not be sold, applied, or otherwise disposed of. *W. Darling* died leaving *Martha* his widow, who afterwards married the pauper, then settled in *Urchfont*, *Martha* and her first husband in his lifetime, [and after his death and her second marriage, and also after the death of the surviving life named in the first lease, she with the pauper her second husband, for the space of four years] continued in the occupation of the cottage and premises to the time of her death, and the pauper continued to pay the lord his quit-rent during his possession*, and at different times repaired the premises, but particularly at one time expended the sum of eighteen shillings ; but it did not appear whether the lord had any knowledge of the assignment. The sessions decided, that

* It was said at the bar that the interest had since determined.

there was an equitable estate in the said cottage in *Martha* the wife of the pauper *Wm. Bailey* at the time of their marriage, and that by reason thereof, and by their subsequent residence thereon for more than 40 days, the pauper gained a settlement in *Edington*.

Lens, Serjt. and *Cusberd*, in support of the order of sessions. Considering that the conveyance to *Price* was made so long ago as twenty-five years, that the trustee never entered upon the possession, and that nothing was done upon it, but that the parties continued to enjoy the premises in the same manner as before, and that they had a right to do so till the trustee thought proper to turn them out; there was at least a possessory right remaining in them which was never divested. After such a length of time, it would not now be competent to the trustee to make an entry: for the object of the trust has failed, and cannot now be executed; as the class of persons to whom payment must now be made are altogether changed by lapse of time from those for whose benefit the trust was created. But at any rate, as the trust was created for a particular purpose to secure the payment of 10*l.* to the parish, the reversionary interest after that purpose was answered, although the present legal estate were in the trustee, would be sufficient to confer the settlement. The value indeed of the property is not stated, but in all probability it must have exceeded 10*l.*; and after so many years it must now be presumed that the debt was satisfied, and consequently the trustee became seised for the sole use of the parties conveying, or that he had re-assigned to them in virtue of the clause in the conveyance. And the conclusion drawn by the sessions shews that in their opinion there was a resulting reversionary interest: and that is also to be collected from the last clause in the deed. Nor is the amount of the purchase-money material, being made by the wife before marriage, and the husband coming to it by act of law(a). It may be argued that this being originally a chattel interest in the wife, it passed to the first husband on the marriage, and that she could not convey afterwards to a second husband. [Lord *Kenyon* said, there was no pretence for such an objection.] At any rate, there was a sufficient interest in the husband to gain a settlement by the residence on the property, which he actually held in right of his wife. In *R v. Offchurch*, 3 Term Rep. 114, a husband was deemed to gain a settlement by residing on an estate vested in trustees for the separate use of the wife. In *Roper v. Ratcliffe*, 2 P. Wms. 5; 9 Mod. 167, 181, where lands were devised to be sold in trust, first to pay debts and legacies, and then to pay the surplus to *J. S.* a papist; he was holden incapable to take under such devise by virtue of the stat. 11 & 12 W. 3, c. 4, inasmuch as it was a profit arising out of land, and the devisee by laying down the money might prevent the sale. So in *R. v. Wivelingham*, Dougl. 767, residence for forty days on a property so devised by one was entitled to a share of the surplus when sold, was holden to confer a settlement. And the same point was ruled in *R. v. Rutland*, Burr. S. C. 793. The only case which can be cited on the other side, which appears at first sight to bear against this, is *R. v. St. Michael's, Bath*, Dougl. 630, and Cald. 110. There the pauper had conveyed to trustees to pay debts; but it expressly appeared that there was no residue, the value of the property not being sufficient to discharge the debts. Besides, there the trustees had entered into possession, and the pauper afterwards got into possession again by fraud. But it was clearly admitted that a mortgagor continuing in possession with the assent of the mortgagee, had such an equitable interest as would gain him a settlement.

Jekyll and *Read*, contra, admitted that an equitable interest in property on which the owner resides was in some cases sufficient to confer a settlement; but insisted that in this case the whole interest was out of the pauper's wife. The parish having relieved the first husband's family were entitled to take

(a) See *R. v. Ilmington*, Burr. S. C. 566.

possession of the property, and the conveyance was made for the purpose of reimbursing them by a sale of it. It was uncertain whether there would be any residue; and therefore it falls directly within the case of *St. Michael's, Bath*. Lord Mansfield there said, the pauper *had only a chance of a residue, and had no right to continue a moment in possession*. It is true, that fraud was an ingredient in the case; but it was not expressly found, and the judgment of the Court was not grounded upon it. Here it is uncertain whether there will be any surplus after payment of the original debt, interest, and costs; and in order to confer a settlement by residence on a person's own estate, he must at the time have some certain interest in it either legal or equitable. In *R. v. Offchurch*, the *cestui que trust* had a right to reside on the estate. But a next of kin, however great his expectancies, cannot gain a settlement by residence on the property till he has fixed his right by taking out letters of administration^(a); neither can a woman communicate a settlement to her second husband in right of her dower of the first, until it is assigned^(b). The property here being a single cottage, there could be no surplus of land after the sale; which was not the case in *R. v. Wivelingham*. The object of the conveyance was for the sale of the *whole*, and not for any partial purpose. The case of *St. Michael's, Bath*, is therefore expressly in point. The continued residence of the parties here was permitted out of charity till an opportunity offered of selling the property. In *R. v. Catherington*, 3 Term Rep. 771, where a mortgagor who had been out of possession was afterwards permitted by the mortgagee to inhabit one of several houses mortgaged in order to overlook some repairs, the Court held such a residence not sufficient for the purpose of a settlement, saying that the party had neither *jus in re* nor *ad rem*.

Lord KENYON, C. J. Some points of this case are very clear. Generally speaking, in the case of a purchase, if the value be under 30*l.* no settlement can be gained by virtue of it; that is, where it comes to the party by his own act; but if it come to him by operation of law, the value is not material. That is the case here: for the purchase was made by the wife before the coverture, and it came to the husband upon his marriage by act of law; and he might even during the coverture have sold it without the assent of his wife. But the objection now made is, that this was not such an interest in the husband as was sufficient to enable him to gain a settlement by residence on the property, on account of the antecedent conveyance to Price the trustee. But what was that conveyance? It was for the purpose of securing the repayment of a sum of money expended by the parish for the use of the man's family. Lord Mansfield, in the case of *St. Michael's, Bath*, said, it was an affront to common sense to say that a mortgagor has no interest in the mortgaged premises⁽¹⁾. The law recognizes his interest: in the case of a freehold, he has a right to vote for members of parliament. Now the conveyance in question is equivalent to a mortgage, and no more. Consider what in strictness is the interest of a mortgagor; after the usual time given for the payment is expired, the estate becomes absolute in the mortgagee at law: but neither the courts of law or equity lose sight of what the parties intended. In mortgage deeds there is sometimes introduced a clause that the mortgagee may repay himself by sale of the mortgaged premises without the concurrence of the mortgagor: but a court of equity would, I believe, control the exercise of that power. I am sure they would control it in an instance like the present upon payment of what was due. The trustee in such a case would be bound to execute a reconveyance: and here there is an express clause to that purpose. Virtually, therefore, this is no more than a mortgage, and must be

(a) *South Sydenham v. Lamerton*, Set. & Rem. 103. 2 Const. 624. *R. v. Widworthy*, Burr. S. C. 109, and *R. v. Loweswell*, Ib. 436. S. P.

(b) Vide *R. v. Pataswick*, Burr. S. C. 783.

(1) Vide 4 Johns. Rep. 48.

governed by the same rules. With respect to the case of *St. Michael's, Bath*, principally relied on, it is very plain that the greatest stress was laid on the circumstance of the pauper's possession having been obtained by fraud. After touching upon the interest which he had in the premises conveyed, Lord *Mansfield* says at the end of the case, "there is still another and a stronger ground in this case; for the possession was obtained by fraud." Now if the other point had been clear, he would not have used such an expression. Here the possession was not fraudulent; and therefore I am of opinion that the second husband, the pauper, gained a settlement by his residence on this estate, which came to him by operation of law on his marriage.

GROSE, J. I cannot distinguish this from the case of a mortgage. The purpose of the conveyance was to secure the money. The parties interested continued afterwards in possession: the pauper paid the quit rents and repaired the premises. Now what more could a mortgagor in possession do? In the case of *St. Michael's, Bath*, another reason is given for the judgment than what is now relied on: the possession there was fraudulently obtained by the pauper: it was expressly found to be against the consent of the trustees who had before taken to the possession. Whereas here the pauper always continued in quiet possession of the premises.

LAWRENCE, J. The principal argument against the settlement set up in this case is grounded on a *dictum* in the case of *St. Michael's, Bath*, in the first part of the opinion delivered by Lord *Mansfield*: without which there is no pretence for the objection. For it cannot be disputed that a conveyance to a trustee in trust by sale, or mortgage, and receipt of the rents and profits to raise 10*l.*, is merely a security for that sum: and it is plain that the parties themselves so considered it, by providing for a re-assignment of all or so much as should not be sold, applied, or otherwise disposed of. Now, in that case, Lord *Mansfield* begins by saying that which is decisive as applied to this "If the estate on which a pauper resides is *substantially* his property, that is sufficient, *whatever forms of conveyance* there may be:" and therefore, he says, that a mortgagor in possession gains a settlement, "because the mortgagee, notwithstanding the form, has but a chattel, and the mortgagee is only a security." If then the object be merely to secure money, whether the conveyance be in the form of a trust like the present, or of a mortgage, it is in substance the same thing.

LE BLANC, J. I am of opinion that the pauper gained a settlement by residing on this estate, in which he had an equitable interest; and I consider that the assignment to the trustee was no more than a security for so much money. According to what was said by Lord *Mansfield* in the case of *St. Michael's, Bath*, the Court will not look to the mere form of the conveyance, but will consider what the parties really meant by it. Then if this were substantially a mortgage, as I think it was, it is clear that the pauper gained a settlement by residing on the premises.

Order of Sessions affirmed(1).

(1) Vide *The King v. The Inhabitants of Tarrant Launceston*, 3 East, 226, which was distinguished from the case in the text on the ground of there being no mortgage, but the absolute conveyance for the discharge of a debt.

The King v. The Inhabitants of Dorstone.

1 East, 296. Feb. 7, 1801.

While the pauper resided in the parish of *B.* a freehold estate descended to his wife and her sisters as coparceners in the same parish and in a month after the pauper and his wife contracted to sell their share, but the conveyance was not actually executed more than forty days after their title accrued: held that the pauper was thereby settled in *B.*, although the estate during all the time was in the occupation of another.

TWO justices by an order removed *Mansell Powell*, together with his wife and children, by name, from the parish of *Dorstone* to the parish of *Blakemere*, both in the county of *Hereford*. The sessions, on appeal quashed the order, subject to the opinion of this Court on the following case: The pauper *M. Powell*, having gained a previous settlement at *Tadley*, went, prior to *November 1778*, to reside with his wife and family in *Blakemere* upon a tenement which he rented there at *1l. 15s. per annum*. On the *14th* of the same *November*, and whilst the pauper resided at *Blakemere*, *T. Matthews* died intestate seised of a freehold house and lands in *Blakemere*, which descended to the pauper's wife and her two sisters as coparceners, being the grandchildren and co-heirs of the said *T. M.* On the *14th* of *December* then next, the pauper entered into the following agreement to sell his wife's share of the house and lands to *John Delahay*, husband of one of her sisters: "An agreement made between *John and Mary Delahay* of *Blackmere* in the county of *Hereford* of the one part, and *Mansell and Ann Powell* of the said parish of the second part, and *William and Mary Croslefor* of *Tiberton* in the said county of the third part, witnesseth, that the said parties have agreed and firmly bound themselves in the sum of *20l.* which money is to be forfeited if either of the parties do not stand to the valuation of the tenement and lands now in the possession of *Mr. Wm. Read and John Delahay*, which land is to be valued by two or three men according to their valuation upon oath, if required. If it is not all freehold, then it must be an abatement in the said price; or if it should be more land, then it must be valued according to the price. The purchase-money is *84l.*, the purchaser to pay the expence of the writing. I bind myself to pay the money at *Candlemas* next, if there is a good title made." Signed by the pauper, his wife, and the other parties. After the agreement was signed the referees valued the pauper's wife's share of the premises at *28l.* The deeds not being ready by the *2d* of *February*, the pauper complained, and *Mr. Elliot*, agent for *John Delahay*, offered to pay him three months' rent for his wife's share of the premises if required; but the pauper did not require it. The deeds were executed and the money paid the latter end of the said *February*, or beginning of *March 1779*. From the *14th* of *November 1778*, when the grandfather died, to the execution of the deeds in the latter end of *February* or *March* following; the pauper resided in the tenement he rented at *Blakemere*, but did not occupy any part of the tenement which descended to his wife and her sisters. The house and garden were in the occupation of the said *John Delahay* and his wife, one of the coparceners, and the rest of the land was occupied by one *Mead*, who had been tenant to the grandfather.

Park was to have argued in support of the order of sessions, and *Williams*, Serjt., contra; but the former admitted, that after the recent decision of the Court in the case of *Houghton Le Spring(a)*, he could not contend that the pauper might not gain a settlement by residing in the same parish in which he had an estate of freehold in right of his wife, although in the occupation of another. But he suggested a distinction between this case and that;

that here the title accrued on the 14th of *November*, and within less than forty days, viz. on the 14th of *December*, the pauper bound himself to convey away the property.

The Court, however, said, that the contract was executory, and the conveyance was not actually executed till long after the forty days were expired, till when the title remained in the pauper, and consequently he gained a settlement in *Blakemere*.
Order of Sessions quashed.

'The King v. Battams and Others.

1 East, 298. Feb. 7, 1801.

A *certiorari* to remove an indictment from the sessions may be sued out by the prosecutor, without giving the six days previous notice required by the stat. 13 Geo. 2. c. 18. s. 5, in the case of removing convictions, judgments, "orders, and other (summary) proceedings." The effect of such writ is to remove all proceedings of the nature described therein which have taken place between the *teste* and return, although the proceedings originated after the *teste*. The magistrates below are bound to obey the writ after production of it and notice to them in fact of such production when sitting in their judicial capacity; and after that all further proceedings before them on the matter are erroneous.

AN indictment was found at the quarter sessions of the peace for the county of *Buckingham*, holden at *Aylesbury* on the 15th *January* 1801, against the defendants for a riot and assault. And at the same sessions the attorney for the prosecutrix delivered to the clerk of the peace a writ of *certiorari*(a) issued out of this court, and bearing *teste* the 28th of *November* last(b), for removing the said indictment into this court; which writ was afterwards handed up to the chairman, and was seen by him and other magistrates on the bench. No return however was made to the writ, nor any notice taken of it by the Court(c). On the first day of this term, the prosecutrix took out the usual sidebar rule upon the justices to return the writ of *certiorari*, which they were directed to do within six days next after notice of the rule to be given to the justices, or one of them, and also to the clerk of the peace or his deputy. Whereupon a rule was obtained on a former day in this term on the part of the defendants, calling upon the prosecutrix to shew cause why this sidebar rule should not be discharged with costs to be paid by the prosecutrix to the clerk of the peace; upon an affidavit stating, that after the finding of the bill of indictment at the time above-mentioned, a writ of *certiorari*, tested the 28th of *November* last, was found upon the table of the court, but by whom placed there was not known; but that the practice had always been to deliver such writs to the chairman, or one of the justices attending in court. That none of the justices of the peace had received six days' previous notice in writing, nor any other notice of the issuing of the *certiorari*, as required by stat. 13 Geo. 2, c. 18. s. 5. The affidavits in answer swore positively to the delivery of the writ by the attorney for the prosecutrix to the clerk of the peace, by whom it was handed up to the magistrates.

Blackstone, in support of the rule(d), contended, 1st, that the writ of *certiorari* had issued irregularly, none of the magistrates to whom it is directed having had six days' notice of the issuing of it, pursuant to the stat. 13 Geo.

(a) The writ runs in this form: "George the third, &c. To the keepers of our peace, &c. we being willing for certain reasons that all and singular indictments of whatsoever riots, assaults, and misdemeanors whereof B. and two others are on the prosecution of A. H. indicted, before you, as is said, be determined before us, and not elsewhere, do command, &c. that you, &c. send under your seals, &c. before us on, &c. all and singular the said indictments," &c. (b) The writ was in fact sued out on the 15th of *January*.

(c) It was stated at the bar, that the next day the trial was called on and the defendants acquitted for want of prosecution; but this did not appear in the affidavits.

(d) The order in which counsel were heard upon shewing cause is here reversed for the sake of a better arrangement of the objections and answers.

2. c. 18. By the prior stat. of the 5 & 6 W. & M. c. 11, and 8 & 9 W. 3. c. 33, certain restraints were laid on defendants suing out writs of *certiorari* to remove proceedings against them. This was followed up by the stat. 5 Geo. 2. c. 19. providing, generally that no *certiorari* should issue for removing any judgment or order of the sessions on appeal, unless the party prosecuting such writ shall give a recognizance to prosecute it with effect, and to pay the costs in case the judgment or order should be affirmed. Then follows the act in question of the 13 Geo. 2, c. 18, which enacts, (s. 5.) "that no *certiorari* shall be granted to remove any conviction, judgment, order, or other proceedings had or made by or before any justice or justices of the peace, &c. or by the sessions, &c. unless such *certiorari* be applied for within six calendar months next after such conviction, &c. or other proceedings, and unless it be duly proved upon oath that the said party suing forth the same hath given *six days notice* thereof in writing to the justice or justices, or to two of them, &c. by and before whom such conviction, &c. or other proceeding shall be so had or made; to the end that such justice or justices, or the parties therein concerned, may shew cause, if they think fit, against the issuing or granting such *certiorari*." The mischiefs which occasioned this act are stated in the preamble to be the *vezatious delays and expence* occasioned by the suing out writs of *certiorari* for the removal of such convictions, judgments, orders, and other proceedings before the magistrates below; these apply as well to the case of prosecutors as of defendants, and the words of the enacting part are comprehensive enough to include both. Then the rule of law applies, that remedial laws are so to be construed as to repress the mischief and advance the remedy. 3 Rep. 7. In the case of *The King v. The Justices of Glamorganshire*, 5 Term Rep. 279, it was holden, that the notice required by the statute must be strictly observed before any application for a *certiorari* for removing proceedings before justices; and no distinction was taken whether it were to remove an indictment on any summary proceeding, or whether it were applied for on behalf of the defendant or the prosecutor. There is a distinction in this respect between the case of the king and that of a private prosecutor; the Court are bound of right to award it at the instance of the king; 2 Hawk. ch. 27. s. 27; but that is confined to cases where the crown is the real prosecutor: but in the latter case it only issues if no sufficient cause be shewn against it. *R. v. Lewis*, 4 Burr. 2456—8. 2dly, The writ bore *teste* before the indictment was preferred, and consequently could not operate to remove that which had no existence at the time. 3dly, But supposing the writ properly issued, it was not regularly delivered to the justices so as to bind them to obey it. It ought to be delivered and authenticated by the party, on whose behalf it is issued, to one of the justices to whom it is directed.

Lord *Kenyon*, C. J. here observed, that if the *certiorari* were produced in court and came to their knowledge, it could not admit of an argument whether or not it should be obeyed. No doubt the Court were bound to yield obedience to it, and all subsequent proceedings upon the matter were void. Here it was sworn that the writ was handed up to the bench and seen by several of the magistrates, which is sufficient notice. And this Court would not lay down rules for regulating the manner in which the writ should be delivered to the justices below.

Garrow, *Marryat*, and *Best* shewed cause against the rule. 1st, The act of the 13 Geo 2. c. 18, does not relate to *indictments*, but merely to summary proceedings before magistrates; the words are, "convictions, judgments, orders, and other proceedings." The latter must mean other summary proceedings like those before enumerated. They could not be intended of indictments and presentments; for, as such, other express provisions are made in respect of removing them by *certiorari* by the statute 8 & 9 W. 3, c. 33. Neither can an indictment be so removed after *judgment*, which is one of the terms used in the act of the 13 Geo. 2; but it can then only be removed by

writ of error; therefore it can only relate to such summary proceedings as may be removed by *certiorari* after judgment. Also, by the constant practice of the Crown Office ever since the passing of the act, upon application for a *certiorari* to remove a "conviction, judgment, or order" of any justices of peace on behalf of a person against whom such proceedings were had, six days' previous notice has been given to the magistrates; but never in the instance of a *certiorari* to remove an indictment. Nor is it practicable in the latter case; for none of the justices have any knowledge of an indictment till it comes before them for trial, and then it would be too late to apply for a *certiorari*. And even in the cases of "convictions, judgments and orders," it has not been considered necessary to give such notice under the statute where the *certiorari* was applied for at the instance of the prosecutor. For where the *certiorari* has even been taken away by the express words of an act of parliament, if the object of the act have appeared to be (as in this instance) to prevent vexation and unnecessary delay, the Court has decided that it only meant to deprive the defendants of the writ, and not to take it away from the prosecutors; as in *Rez v. Davies and others*, 5 Term Rep. 626, upon the construction of the stat. 25 Geo. 2. c. 36. s. 10., and *Rez v. The Inhabitants of the county of Cumberland*, 6 Term Rep. 194, on the construction of the stat. 1 Ann. c. 19, s. 5. Where indeed a defendant applies for a *certiorari* to remove an indictment, he must state some special ground by affidavit to induce the Court or a Judge to grant the writ(a). There is no foundation for the distinction contended for between the crown and a private prosecutor: as was determined in the case of *R. v. The Inhabitants of Bodenham*(b). At any rate, the present rule cannot be supported; for if the writ improperly issued it may be quashed; yet so long as it is in force it must be obeyed, and the grounds of issuing it cannot be disputed by the sessions. 2. As to the *teste* of the writ being prior to the finding of the indictment, it is the constant practice, and forms no objection to its operation. The effect of it is to remove all proceedings of the nature specified between the *teste* and the date of the return. Case of *Adrian Lampereve, and others*, 1 Ventr. 60. 1 Rol. Abr. 395, cites *Cheney's case*, 2 Hawk. c. 27. s. 78. *Gross v. Smith and others*, 1 Salk. 148. 2 Ld. Raym. 838; *Ibid.* 1305; *Regina v. White*, 1 Salk. 150; *Fitzwilliam's case*, Cro Eliz. 915; Yelv. 32, and *R. v. Spelman*, 1 Keb. 93. After the delivery of the *certiorari* all the subsequent proceedings in the court below were erroneous. 2 Hawk. c. 27. s. 64.

LORD KENYON, C. J. The words of the stat. 13 Geo. 2. c. 18, do not seem to me to affect the present case. It begins with enumerating proceedings of a lower denomination than indictments, such as "convictions, judgments, and orders" by justices of the peace; then the words "other proceedings" must mean proceedings before them *ejusdem generis* with those before mentioned, namely, summary proceedings; and to such only it appears on perusal of the act that other provisions of it apply. His Lordship then referred to the case of *The King v. Farewell*(c), (which he read from a MS. note of the late Mr.

(a) Vide *R. v. Lewis and others*, 4 Burr. 2456.

(b) Cowp. 78. In another respect, however, a distinction prevails in the practice of the Crown-office between the case of the crown and that of a private person. Though a statute take away the *certiorari* from a defendant, or he cannot have it without laying special ground by affidavit before the Court, yet the crown, if the defendant be one of its officers, or if for any other reason it take up his defence, may have a *certiorari* in the name of the defendant, without laying any special ground. Thus in the two cases alluded to by Lord Mansfield in 4 Burr. 2456, his Lordship, when Attorney-General, obtained the writ; though a private individual would not have been entitled to it. Also in the case of *Rez v. James*, M. 26 Geo. 2., the Court granted the Attorney-General a *certiorari* to remove a record of conviction after six months, although the stat. 5 Geo. 2. c. 19, expressly directs that the *certiorari* shall be applied for within that time. And in *Rez v. Stannard*, 4 Term Rep. 161, the same thing was done at the instance of the Attorney-General applying for the defendant, although no special ground was laid before the Court by affidavit, as is required in other cases.

(c) Vide 2 Stra. 1194. 1209.

Masterman, of the Crown Office.) A *certiorari* having issued at the instance of the prosecutor to remove an indictment for a nuisance in a highway from the quarter sessions, without an affidavit that the right of repair would come in question pursuant to the stat. 5 & 6 W. & M. c. 11, or any recognizance given according to that or former statutes; it was moved in Hil. 17 Geo. 2, that the *certiorari* should be quashed. The case was afterwards debated in *Easter* 17 Geo. 2, by some of the ablest men at the bar; and Ld. C. J. *Lee*, who was a judge of the greatest caution, enlarged the rule in order to look into the several acts of parliament; but observed at the time, "that he had never known an instance where an affidavit in such a case was ever made by or expected from a prosecutor, or any recognizance ever entered into;" and that it would make great confusion in the Crown Office to overturn the proceedings in so many cases of that sort as had occurred. Mr. Justice *Chapple* also said, "that the legislature by those acts of parliament never intended to lay prosecutors under any hardships or difficulties." And it appears that ultimately the *certiorari* was deemed to have been properly issued. It is true, the decision there was not upon the particular statute in question, but it was made upon a general review of the subject; and the Court thought that the general words of the statutes restraining the issuing of writs of *certiorari* did not attach on prosecutors. The same construction has been put upon the statute in question during a long course of practice, and it is now too firmly established to be broken in upon. These matters may not be so well known to the magistrates below, to whom I impute no blame; but we must take care to preserve a congruity in our proceedings. If the writ had improperly issued, there should have been an application to quash it; but it should not appear that there is a writ of the king's in force which is disobeyed.

Per Curiam,

Rule discharged with Costs.

The King v. John Suddis.

1 East, 306. Feb. 9, 1801.

By the mutiny act the king may make articles of war and constitute courts martial with power to try and punish, as well in *Great Britain*, &c. as in *Gibraltar*, &c. By a subsequent clause no soldier shall by such articles of war be subjected to the punishment of death or loss of limb within *Great Britain*, &c. (omitting *Gibraltar*) for any crime not expressed to be so punishable by the act. Then by the articles of war persons found guilty by a court-martial at *Gibraltar* of theft, robbery, &c. or of having used violence or committed any offence against the persons or property of others, "shall suffer death or such other punishment, according to nature and degree of the offence, as by the sentence of such court-martial shall be awarded;" held that the court-martial have a discretionary power by such words, and are not restricted to pass such sentence on a delinquent as would be warranted by the law of *England*. But supposing they were, yet that a return to a *habeas corpus*, stating that upon a certain charge exhibited against the defendant before such a court, for certain offences alleged to have been committed by him at *Gibraltar*, such proceedings were had that the court-martial, after hearing the charge and the defence, found the defendant guilty of receiving certain goods named from the warehouse of *W.* (at *G.*) knowing them to be stolen, in breach of the articles of war, whereupon they sentenced him to transportation for 14 years, is good. For such a sentence would be warranted here by the stat. 4 Geo. 1. c. 11, if the principal were convicted of the felony, and the receiver were indicted as accessory after the fact. It seems a sufficient return to a *habeas corpus* that the defendant is in custody under the sentence of a court of competent jurisdiction to inquire of the offence and to pass such a sentence; without setting forth the particular circumstances necessary to warrant such a sentence.

A Writ of *habeas corpus* was directed to Sir *Wm. A. Pitt*, governor of *Portsmouth*, to bring up the body of *John Suddis* in custody under his orders; to which he made the following return: that before the coming of the annexed writ to him, and before and at the time of the trial and sentence hereinafter mentioned, and also before and at the time of the committing of the offence in

the same sentence mentioned, *John Suddis* in the writ named was a gunner in his majesty's royal regiment of artillery, then being stationed and in garrison at *Gibraltar* beyond the seas, and was in the actual pay of the king as a member of the garrison of *Gibraltar*; and was under the command of *Charles O'Hara* Esq. governor of *Gibraltar*. That on the 19th of May 1800, the said *John Suddis*, so being in actual pay as a member of the garrison at *Gibraltar*, was tried by a general court-martial duly holden at *Gibraltar*, appointed by the said *C. O'Hara* the said governor, and erected and constituted by and under the authority of his majesty, according to the form of the statute in that case made and provided, with power to try, hear, and determine any crimes or offences by and in pursuance of the articles of war made and established by his majesty for the better government of his majesty's forces, upon a certain charge exhibited against him before the same court-martial for certain offences alleged to have been committed by him at *Gibraltar* aforesaid; and such proceedings were thereupon had by and before the said court-martial, that afterwards, viz. on the day and year aforesaid, at *Gibraltar* aforesaid, the said court-martial did pronounce upon the said *John Suddis* the following sentence; (viz.), the Court having heard the evidence in support of the prosecution, together with what had been brought forward by the prisoner (the said *John Suddis*) in his defence, is of opinion that the prisoner *John Suddis* is guilty of receiving several pieces of printed cotton and two pieces of broad cloth stolen from the warehouse of Mr. *S. Watkins*, knowing them to be stolen, in breach of the articles of war; and doth, therefore, by virtue of the 4th article of the 24th section of the articles of war, sentence him the said *John Suddis* to be transported as a convict to *Botany Bay* for the term of 14 years. That afterwards the aforesaid sentence was approved of and confirmed by the said governor of his majesty's garrison of *Gibraltar*; and the said governor did, in order to carry the same sentence into effect, cause the said *John Suddis* to be sent to *England* in the custody of lieutenant *Rogers*, one of the lieutenants of the 70th regiment of his said majesty. And that afterwards, the said *John Suddis* having arrived in *England* and landed at *Portsmouth* aforesaid, in the custody aforesaid, and for the cause and purpose aforesaid, was by the said lieutenant *Rogers* delivered to him (*Sir W. A. Pitt*) as governor of his majesty's garrison at *Portsmouth*, to be by him safely kept until he should be sent to *Botany Bay* aforesaid, in pursuance and execution of the aforesaid sentence; and is now detained in his custody for the cause and purpose aforesaid, the said term of 14 years not being yet expired. And he further returned, that at the several times before mentioned the said *Samuel Watkins* was and is a subject of our said lord the king; and no form of civil judicature was in force at *Gibraltar* aforesaid having power to try an offender being a person in actual pay as a member of the said garrison of *Gibraltar*; and that the said warehouse in the sentence mentioned was and is situate at *Gibraltar* aforesaid: and this is the cause, &c.

Erskine, on behalf of the prisoner, admitted that the king had a military-power to try offenders of this description at *Gibraltar*, in the absence of all civil judicature at that place: but objected to the insufficiency of the return, because it did not appear that the sentence of the court-martial was in conformity to the municipal law of *England* against such offenders, by which that court sitting in judgment for such offence was bound.

Abbott in support of the return. 1. It is a general rule, that where a person has been committed under the judgment of another court of competent criminal jurisdiction, this court cannot review the sentence upon a return to a *habeas corpus*. This was so determined in *Brass Crosby's* case, 3 Wils. 199. In such cases this court is not a court of appeal. So in *Barne's* case, 2 Roll. Rep. 157; he was imprisoned by the Court of Admiralty until he should pay 40*l.* or restore an anchor he had taken: and this being returned on a *habeas corpus*, a motion was made to discharge him on objections taken to the legality

of the commitment: but *Montague*, C. J. said, "it appears by the words "*consideratum est* that there was a judgment given against him; and although "the manner of their proceeding be not according to our law, yet we cannot "redress it by the course now taken." "And also a return differs from other "judicial proceedings, and such precise certainty is not required in returns; "but it is sufficient if the court can learn from the return the substance of the "matter." Therefore, 2dly, supposing the court martial at *Gibraltar* were confined to inflict such a punishment only as the courts of criminal law here could have done, at least this court will support the sentence if possible by every reasonable intendment in its favour; and this may be done by supposing the principal to have been convicted, and *Suddis* tried as an accessory under the stat. 4 Geo. 1, c. 11. This will appear upon a review of the several statutes. The stat. 3 & 4 W. & M. c. 9, makes receivers of stolen goods accessories after the fact. The stat. 5 Ann. c. 21. s. 5., which has the same provision, enacts, that such accessory shall suffer death as a felon. Then the stat. 4 Geo. 1. c. 11, enacts, that they may be transported for 14 years. This must be understood where they have been tried for the felony; for s. 6. of the stat. 5 Ann. c. 21. provides that they may be tried for a misdemeanor if the principal be not convicted; or by stat. 22 Geo. 3. c. 58. s. 1. whether the principal be amenable to justice or not: and in either of such cases the accessory is punishable by fine, imprisonment, or other corporal punishment. But, 3dly, The court-martial had a discretionary power to inflict what punishment they pleased, and were not bound to conform to our municipal laws. This is a transaction out of the realm, within a jurisdiction purely military. Our laws do not extend to *Gibraltar proprio vigore*. A discretionary power even to death is given to the courts-martial there: it is necessary to the preservation of military discipline. The mutiny act authorizes the king to delegate to them that power. By s. 18. the king may make articles of war, which shall be judicially noticed by all the judges. By s. 19. he may constitute courts-martial with power to try and punish, "as well with- "in *Great Britain, Jersey*, and the isles, &c. as in his majesty's garrison of "*Gibraltar*, and in any of his dominions beyond the seas." By s. 20. "No "officer or soldier shall by such articles of war be subjected to any punish- "ment extending to life or limb within *Great Britain, Jersey*, or the isles, &c. "for any crime not expressed to be so punishable by the act." This clause, which restricts the general power of punishment before given to courts martial, omits *Gibraltar and the king's dominions beyond sea*. Sect. 5. of the same act enables the king to grant his warrant to the governor of *Gibraltar* and of any other of his majesty's dominions beyond seas, for convening general courts-martial (of which by s. 11. the governor cannot be one) for the trial of offences committed by any of the forces under their command, who are to regulate their proceedings in the manner thereafter specified. By s. 9, provision is made for delivering up to the civil magistrate all offenders "accused of any capital crime, "or of any violence or offence against the "person, estate, or property of any of his majesty's subjects which is punish- "able by the known laws of the land:" but that does not extend to *Gibraltar*. The sentence in question is founded on the 4th article of the 24th section of the articles of war, which says, that "notwithstanding its being directed in "the 11th sect. of these our rules and articles, that every commanding officer "shall deliver up to the civil magistrate all persons under his command who "shall be accused of any crimes which are punishable by the known laws of "the land, yet in our garrison of *Gibraltar*, or in any other place beyond the "seas, &c. where there is no form of our civil judicature in force, the gov- "ernor, &c. is to appoint general courts-martial for the trial of persons "under his command accused of murder, theft, robbery, &c. or of having "used violence, or committed any offence against the persons or prop- "erty of any of our subjects, &c.; and the persons so accused, if found

"guilty, shall suffer death or such other punishment, according to the nature and degree of their respective offences, as by the sentence of any such general court-martial shall be awarded." Now the above general words describing offences are the very same which are used in the first article of the 11th section of the articles of war, and also in the 9th section of the mutiny act, to denote every species of crime triable by the civil magistrate. And as to their inflicting punishment according to the nature and degree of the offence, a court-martial does not found its proceedings upon the common or upon the civil law: But they are sworn, according to the 12th sect. of the mutiny act, to administer justice according to the rules and articles of war, and according to the mutiny act. They must, therefore, judge according to the dictates of conscience and the necessity of the case. In military jurisdictions it may often happen in cases of emergency that a court-martial may be obliged to inflict death for an offence which at other times would require only a lenient punishment, and for which death could in no event be inflicted by the civil magistrate. The above mentioned provisions are therefore certainly ample enough to warrant the sentence which has been here pronounced.

Erskine, contra. The court-martial which pronounced sentence on the prisoner is a court of inferior and limited jurisdiction; and if it appear upon the face of their proceedings that they have exceeded their authority, this court, though not a court of error for the purpose, have power on a return to a *habeas corpus* to interfere on behalf of the subject aggrieved. It might as well be contended, that if magistrates below, having power to inflict a penalty in a certain case, were to pass sentence of death on a delinquent and commit him for that purpose, this court could not liberate him. The words relied on, "shall suffer death or such other punishment according to the nature and degree of their respective offences as the court-martial shall award," do not give that court an unlimited discretion, but bind it to decide according to the rules of the law of England. In the late case of the mutineers of the *Bounty*(a), who were tried by a court-martial at *Portsmouth*; there being no evidence against one of the persons accused, it was insisted on the part of another of them that he had a right to examine the first on his behalf: the Court however, by the advice of the Judge Advocate, refused to let him be examined, saying, that the practice of courts-martial had always been against it; and the prisoner was condemned to death: but upon the sentence being reported to the king, execution was respited till the opinion of the Judges was taken; who all reported against the legality of the sentence on the ground of the rejection of legal evidence; and the party was afterwards discharged. A similar case happened still more recently before a court-martial in *Ireland*, in the instance of *Mr. Stratford*, where the sentence was set aside on account of an irregularity in the trial against the rules of the common law. By what other rules or principles than those of the law of England can a court-martial measure the nature and degree of the offence? Then it is contended that this court, if necessary, will intend that the sentence was legal, and that they will presume that the principal was convicted. But the court can no more intend jurisdiction in an inferior tribunal upon a return to a *habeas corpus* than in any other mode of proceeding. It ought at least to have appeared that he was charged as accessory to a felony under the statute, and that he was convicted of such offence: but no specific charge is stated, and he is convicted generally of having knowingly received the stolen goods mentioned, in breach of the articles of war: and no such offence being therein particularly specified, the jurisdiction can only be derived under the general words before mentioned, which

(a) This ship was sent by his majesty a few years ago under the command of Capt. Bligh, for the purpose of transplanting the bread fruit and other valuable plants from the islands in the South Sea to the British colonies in the West Indies. A great part of the crew mutinied during the voyage, and took possession of the vessel.

relate to offences known to the law of *England*, by which therefore the trial and judgment must be regulated.

LORD KENYON, C. J. I feel no difficulty in delivering the opinion which I entertain; because the prisoner will not be concluded by it, but may if he be dissatisfied, apply to the other courts of *Westminster-hall*. The natural leaning of our minds is in favour of prisoners; and in the mild manner in which the laws of this country are executed, it has rather been a subject of complaint by some that the Judges have given way too easily to mere formal objections on behalf of prisoners, and have been too ready on slight grounds to make favourable representations of their cases. Lord *Hale* himself, one of the greatest and best men who ever sat in judgment, considered this extreme facility as a great blemish, owing to which more offenders escaped than by the manifestation of their innocence. We must however take care not to carry this disposition too far, lest we loosen the bands of society, which is kept together by the hope of reward and the fear of punishment. It has been always considered, that the Judges in our foreign possessions abroad were not bound by the rules of proceeding in our courts here. Their laws are often altogether distinct from our own. Such is the case in *India* and other places. On appeals of the Privy Council from our colonies, no formal objections are attended to if the substance of the matter, or the *corpus delicti*, sufficiently appear to enable them to get at the truth and justice of the case. The prisoner in this instance has been tried before a court of competent jurisdiction at *Gibraltar*, by which he has been convicted of receiving certain goods knowing them to have been stolen, and has been sentenced to transportation for fourteen years. It is not denied but that for the same *corpus delicti* (not indeed in the same form) the same judgment might have been given in the courts here, if the principal had been convicted: which however does not in truth at all affect the guilt of this man. But it is said, that this not appearing, we must take the sentence to be illegal. Whether the principal were or were not convicted does not appear upon this return; it only says, *taliter processum est, &c.*; why therefore are we to conclude that the sentence is illegal? We are now sitting as a court of error to review the regularity of their proceedings, nor are we to hunt after possible objections. I have said this, admitting *pro hac vice* that we may examine into this question on a return to a *habeas corpus*; but that is an arduous question, on which, if it were necessary, I should wish to take much more consideration. At present, I see no reason for saying that the cause returned is not sufficient.

GROSE, J. It was properly admitted, that the court-martial had authority to try the offender and inflict punishment according to the nature and degree of the offence as regulated by the law of the land. Then taking that to be so, the answer to the objection made to this return is, that according to the law of this land the court-martial might under certain circumstances have inflicted the punishment which they have awarded for this offence, that is, if the principal had been convicted of the felony, and this party had been tried as the accessory under the statute. But it is said, that this does not so appear upon the face of the return. That however is an objection in error, and we do not sit now as a court of error. It is enough that we find such a sentence pronounced by a court of competent jurisdiction to inquire into the offence, and with power to inflict such a punishment. As to the rest we must therefore presume *omnia rite acta*.

LAWRENCE, J. Two objections have been made to the return; first, that the court-martial have exceeded their jurisdiction in inflicting a punishment beyond what they were authorized to do. That turns upon the construction of the 4th article of the 24th section of the articles of war, by which persons found guilty of any of the offences therein described "shall suffer death or such other punishment, according to the nature and degree of the offence, as by the sentence of the court-martial shall be awarded." And these words,

it is said, must be understood *according to the laws of England* under similar circumstances. I do not however think that this is the proper meaning: but that it was intended to give the court-martial a discretionary power to apportion the punishment according to the degree of guilt of the party convicted. If it had been meant that their judgment should be governed by the law of *England*, it would have been more obvious to have so expressed it than to have used such general and indefinite terms. Secondly, assuming that the court-martial was bound to give judgment according to the laws of *England*, it is objected that the sentence is illegal, because it does not appear upon the face of the return that the principal was convicted; but I cannot admit the validity of that objection on this proceeding. This is a return to a writ of *habeas corpus* made by the person in whose custody the party is placed in execution of his sentence. He cannot be taken to be cognizant of all the proceedings. It is enough that the court had authority to award such a sentence. He returns the cause for which he detains the party in custody, namely, the judgment of such a court. This return, I believe, is as much as it has been ever usual to make in such cases. However, I am of opinion upon the first objection, that the court-martial were not bound to pass such a sentence as the law of *England* would warrant upon a similar charge.

LE BLANC, J. The principal question is, Whether a party who is in custody under the sentence of a court of competent jurisdiction, and is brought up here upon a writ of *habeas corpus*, be entitled to his discharge on the ground, that it does not appear upon the face of the return that certain facts existed which are contended to be necessary to warrant such a sentence. It is not denied that the court-martial had power to try the offender: but it is contended, that the words alluded to in the articles of war, "according to the nature and degree of the offence," &c. restrained the court to pass such a sentence as was conformable to the law of *England* in the like case. But I cannot accede to that construction. It seems to me to have been intended to give the court-martial a discretionary power of inflicting punishment on the offender, having regard to the enormity of the offence. This gets rid of the objection as to the principal not appearing to have been convicted. But another objection is, that it does not appear that the party was charged with the offence of which he was convicted. To which the answer is, that it is sufficient for the officer having him in his custody to return to the writ of *habeas corpus*, that a court having a competent jurisdiction had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence.

The Prisoner was remanded.

Eyre and Another v. Dunsford.

1 East, 318. Feb. 9, 1801.

The defendant having had a credit lodged with him by a foreign house in favour of one *W. T.* to a certain amount, upon an express stipulation that *W. T.* should previously lodge in his hands goods to treble the amount; and being applied to by the plaintiffs for information respecting the responsibility of *W. T.* answered that he knew nothing of *W. T.* himself, but what he had learned from his correspondent; but that he had a credit lodged with him for so much by a respectable house at *H.* which he held at *W. T.*'s disposal; (omitting the condition,) and that upon a view of all the circumstances which had come to his (the defendant's) knowledge, the plaintiffs might execute *W. T.*'s order with safety; (viz. an order for the sale and delivery of goods on credit). In an action on the case to recover damages incurred by the plaintiffs in consequence of having trusted *W. T.* on this representation; held that there was a material suppression of the truth, and evidence sufficient for the jury to find fraud, which is the gist of the action; although the defendant had no immediate interest in making the false representation; and though at the time when it was made, he added, that he gave the advice without prejudice to himself.

THE declaration stated, that before the committing of the grievance after
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mentioned, to wit, on the 24th of *May* 1799, at *London*, &c. one *William Thompson*, then of *Hamburg*, applied to the plaintiffs (traders,) and requested them to export, sell, and deliver to him goods of great value upon credit; and thereupon the plaintiffs being unacquainted with the credit, circumstances, and character of *Thompson*; and whether they might safely sell and deliver to him goods upon credit, applied to the defendant (being a partner in trade with one *Léchigaray*) to be by him truly informed of the credit, circumstances, and character of *Thompson*; of all which said premises, &c. the defendant had notice from the plaintiffs, and was requested by them to inform them truly of the credit, circumstances, and character of *Thompson*; and thereupon the defendant fraudulently, deceitfully, and wrongfully contriving and intending to deceive, injure, and prejudice the plaintiffs, and to induce and cause them to export, sell, and deliver the said goods to *Thompson*, upon credit, afterwards, &c. did falsely, deceitfully, and wrongfully affirm and represent to the plaintiffs, that *they*, the defendant and his partner, *were informed by a very respectable house at Hamburg, that Thompson was of respectable connexions, and a person to whose character they* (the said defendant and his partner) *might speak with confidence; and that the defendant and his partner had a credit lodged with them by the same house for 12,000*l.*, which they held at Thompson's disposal.* And on the defendant's being informed by the plaintiffs, that the amount of the goods which *Thompson* had so applied to the plaintiffs to export, &c. to him, would be about 1000*l.*, the defendant further intending as aforesaid, did falsely, &c. affirm and represent to the plaintiffs, *that they* (the defendant and his partner, *thought the order might be executed with safety.* That the plaintiffs confiding in the said assertions and representations of the defendant, and believing the same to be true, and not knowing the contrary thereof, afterwards, to wit, on the 15th of *August* in the year aforesaid, &c. were thereby induced to and did export, sell, and deliver to *Thompson* the goods to the amount of 710*l.* 12*s.* 9*d.* upon credit for six months: whereas in truth at the time the defendant so made the said affirmations and representations, he and his partner were not, nor had been, informed by a very respectable house at *Hamburg*, that *Thompson* was of respectable connexions, and a person to whose character the defendant and his partner might speak with confidence, and *the defendant well knew the same*; and in truth, the defendant and his partner at the time, &c. had not a credit lodged with them by the said house at *Hamburg*, &c. for 12,000*l.* &c. and the defendant well knew the same; and in truth, at the time, &c. *they*, the defendant and his partner, *did not think the said order of the said Thompson might be executed by the plaintiffs with safety.* And the plaintiffs further say, that although the said six months for which they did so trust and give credit to *Thompson* for the goods are elapsed, yet *Thompson* hath not yet paid the plaintiffs, &c. for the said goods, &c., and ever since hath been and still is unable to pay, &c. By means whereof, &c. There were other counts to the same effect, varying the words spoken. To this the general issue was pleaded.

At the trial before *Le Blanc, J.* at the sittings after last term at *Guildhall*, it appeared in evidence that the plaintiffs were woolen manufacturers living at *Leeds*; and the defendant a merchant in *London* in partnership with *Léchigaray*. Previous to the transaction in question, the defendant's house had received a letter from *Claude Coulett, and Co.*, a respectable house at *Hamburg*, which explains the nature of their connexion with and knowledge of *Thompson*, the person named in the declaration; of whom or his situation and circumstances the defendant had no personal knowledge or other notice than the letter itself imports. This letter was dated *Hamburg, 1st March* 1799, and was produced in evidence as containing the account of the original credit lodged with the defendant for *Thompson*. "We are to-day enabled to speak to you of the business relating to the consignment of goods of *English* manufacture which has already been agitated between us. It is agreed

" that the people who forward these articles shall consent to receive only
 " one third of the value by anticipation, instead of the half, as had been first
 " proposed ; which gives a greater degree of solidity to our arrangement. We
 " authorize you in consequence to furnish for our account to Mr. *William*
 " *Thompson* of this city, or to his order, your acceptance to the extent of
 " ten or twelve thousand pounds sterling, for which acceptance there will be
 " previously delivered to you goods of *English manufacture* in wool or cot-
 " ton do. to the extent of thirty to thirty-six thousand pounds sterling,
 " which will be submitted to your verification and valuation, so that there
 " may be nothing over-rated either in the prices or in the quality. You
 " have annexed the signature of Mr. *William Thompson*, in order that you
 " may know it to a certainty. We have delivered to him a letter making men-
 " tion of the above credit, and which he will forward to you with what he
 " may have to add at the foot of his signature. Hitherto we know only
 " him in this business, our relations with him and his existence, which
 " known to us have enabled us to appreciate the confidence which he de-
 " serves, and with which he has inspired us. He is a merchant of this city.
 " It is very probable that the delivery of the goods will not take place at once,
 " but that they will be gradual ; which will put an interval to your acceptan-
 " ces, and will give you a greater facility in the payment. Not wishing to
 " neglect any means that may free our affairs from all kinds of obstacle, you
 " will take every precaution that the goods in your hands may be secured
 " against any attack or ulterior pursuits ; since not knowing the laws of your
 " country we cannot too strongly recommend to you to put our property under
 " shelter from every unpleasant event. Prudence dictates to us these reflec-
 " tions, the justice of which you will undoubtedly see. We have prevailed
 " upon the friend who has procured us this business to leave to your care to
 " cover the insurance of the whole amount of the goods that may be delivered
 " to you, for which however you will only be under acceptance of the third :
 " but on consenting thereto he has made it a condition that one half of the
 " usual commission should be allowed to him, since he makes a sacrifice of the
 " advantage to be derived on effecting the insurance here, in order to increase
 " your security. We found this proposal so reasonable, that we have not
 " hesitated to assure him of your concurrence. It is then agreed in conse-
 " quence of the first opening which we made use of in this business, that
 " you shall be allowed one per cent. commission on the amount of your
 " acceptances ; for which you will receive the goods, have them examined
 " and valued, and shipment made to us by vessels positively under convoy,
 " unless an express alteration should be made by us. We will hand you re-
 " mittances in time to cover your acceptances : if however contrary to our ex-
 " pectations these remittances should be retarded, you will value on us with
 " the needful advice. We do not presume that it is probable any delay will
 " be occasioned by the winds ; for it would be extraordinary if a triple value
 " of goods did not furnish in the first sales sufficient to face these first engage-
 " ments. As to the rest, rely upon our care and punctuality, &c. If the per-
 " sons who consign these articles find they turn to account, they will doubt-
 " less continue them, and furnish fresh parcels of goods in proportion to the
 " sums of which you shall be covered ; so that without exceeding the pre-
 " scribed limits of your acceptances, certain activity will always be kept up,
 " and increase the advantages which we may each expect from this operation.
 " It is understood that the drafts which shall be insured upon us shall be at
 " three months. We doubt not but the houses from whom you are to re-
 " ceive goods to such an extent are people of respectability. We leave to
 " your judgment to conceive if the credit which Mr. *Thompson* will transmit
 " to them in virtue of the one which we give him on you will equal a recom-
 " mendation ; we shall see it with the more pleasure, as these houses are
 " spoken of to us in the highest terms. Although we have not the pleasure

"of being acquainted with them, we shall be obliged to you for what you may do on this business. Postscript. The letter of recommendation and credit which we have given to Mr. Thompson will be remitted to you by Messrs. Meyer, Wernor, and Company, whose signature is in the same paper as that of Mr. Thompson. Be so obliging to take note thereof." It also appeared, that previous to the transaction in question, application was made to the plaintiffs to furnish goods to Thompson at Hamburg; which application was conveyed to them in a letter from a Mr. Cole of Hamburg, dated 24th of May 1799, in which Thompson was recommended to them as a valuable correspondent, and a promising character given of him: and at the same time the plaintiffs also received a letter from Thompson himself, expressing his wish to purchase goods of them, and referring them to the house of Lichigaray and nephew (the defendant's house) for his character. In consequence of this, the plaintiffs sent up these letters from Leeds to their agent in London, with directions to apply to the defendant's house to whom they had been referred for Thompson's character. Accordingly on the 8th of June, 1799, the plaintiffs' agent went to the defendant's house, and there communicated to him that he waited on him from the plaintiffs to inquire the character of William Thompson of Hamburg, and shewed him the letters which the plaintiffs had before received. The defendant answered, *we do not know Mr. Thompson ourselves, but he is recommended to us by a very respectable house at Hamburg as a man of respectable connexions.* Being asked if they knew any thing of Thompson's property, the defendant answered, *that they knew nothing of him themselves; that what they knew of him they had obtained from a house at Hamburg.* The agent then asked the defendant if he knew Cole, of whom the plaintiffs had a very short acquaintance, and had had no dealings with him; he answered, not much, but he had been introduced by respectable persons. Being then questioned again about Thompson, the defendant answered, *"we have a credit lodged with us by a very respectable house at Hamburg for 12,000*l.* which we hold at his (Thompson's) disposal."* The defendant then asked the plaintiffs' agent what was the amount of Thompson's order on them for goods? and being answered, about 1000*l.*, made no immediate reply. The agent then asked him "if every thing was regular with Thompson, and whether from a view of all the circumstances that had come to their knowledge the plaintiffs might execute the order with safety." The defendant answered, *"yes; every thing is regular, and I think you may execute the order with safety; but we give this advice without our prejudice."* The plaintiffs, relying on this representation, executed the order, by furnishing goods to Thompson to the value of 712*l.* 9*s.*, at six months credit. Thompson soon after failed. The agent also swore positively, *that the defendant never mentioned the condition on which the house at Hamburg had given Thompson credit, (as stated in their letter to the defendant's house before mentioned; namely, on a previous deposit of goods to the amount before mentioned,) but the representation was made to him without the qualification of any condition whatever.* On the other hand, a witness produced by the defendant swore, that the defendant had expressly mentioned to the plaintiffs' agent, that the credit was lodged with them by the house at Hamburg to the amount stated, *on condition of goods to a superior amount being to be delivered to them.* The case went to the jury principally on the credit which they would give to one or other of the witnesses; the learned Judge conceiving that if they believed the plaintiffs' account of the conversation, and that so material a circumstance as the condition on which the credit had been given was suppressed by him in the representation which he made to the plaintiffs of Thompson's responsibility, they would be entitled to a verdict for damages, notwithstanding the advice was said to be given *without their prejudice.* The jury believed the plaintiff's witness, and found a verdict with damages to the amount of the loss sustained.

A rule was obtained to shew cause why there should not be a new trial, on the ground that the foundation of such an action is actual fraud and deceit, and not merely forgetfulness, inadvertence, mistake or neglect. That it was a material averment in the declaration, *that the defendant*, at the time when the representation was made of *Thompson's* credit, "*did not think*" that the order of *Thompson* on the plaintiffs might be executed by them with "safety," of which there was no proof; on the contrary, there was reason for him to think well of *Thompson* from the general tenor of the letter which the defendant and his partner had received from their correspondent at *Hamburg*, and which appeared and was stated to be the foundation of their knowledge of *Thompson*. That the utmost amount of the evidence was, that the defendant had inadvertently omitted to state the ground on which the credit for *Thompson* had been lodged with his house, namely, the security of goods to a greater amount; but this in itself was no evidence of fraud, to commit which the defendant had no motive of interest; for the commission which it appears that he was to receive was merely upon the acceptances made by his house in favour of *Thompson*. That in *Pasley v. Freeman* (a) it was settled, that in order to sustain the action not only the affirmation by which the plaintiff sustained damage must be false, but it must be made with intent to defraud, being in the nature of an action of deceit. And that in all the actions which had been tried since that, there had been actual fraud proved, an intention to procure an unwarrantable advantage either to the adviser himself, or to some other for whom he was interested, to the prejudice of the plaintiff. That here the question of fraud had not been left distinctly to the jury; so that they might have found their verdict upon the supposition that inadvertence alone was a sufficient ground for the action, provided the representation were untrue, and the plaintiffs had been thereby induced to give the credit, which had turned out to their detriment.

LE BLANC, J. stated, that the struggle at the trial was, whether the witness for the plaintiffs or for the defendant were to be credited, as to the suppression or disclosure of the material circumstance in the communication made by the defendant to the plaintiffs: the consequence resulting in either case seemed to be taken for granted; and the question of fraud was therefore probably not so fully and pointedly put to the jury as it would otherwise have been.

Garrow and *Gibbs* shewed cause against the rule. The defendant, if he made any representation at all, was bound to make a fair and impartial one. The omission made by him was too important to have happened from mere inadvertence; and that was not the ground of his defence at the trial, but a denial of the fact. In truth, the defendant had an interest at stake in holding up the general credit of *Thompson*, although he was not to gain any thing by the particular transaction; for if *Thompson* continued in credit and ability, the defendant would in the course of his dealings with him get a commission on the money passing through his hands, which might have been to the amount of 36,000*l.*, the value of the goods to be deposited. And no doubt the jury decided on that ground.

Erskine and *Park* then argued in support of the rule, insisting upon the grounds before stated. In addition to which they observed, that the defendant was not fairly put on his guard by the representation of any doubt entertained by the plaintiffs respecting *Thompson's* character; which might have recalled all the circumstances of the relation between them to his recollection. On the contrary, the letter which the plaintiffs themselves had received from *Cole* at *Hamburg*, which was communicated to the defendant, was rather calculated to increase his good opinion of *Thompson*. That fraud ought not to be implied in such a case, but there should be express and positive evidence of it. That without such a broad line of distinction the nature of the action was

(a) 3 Term Rep. 51. all the authorities upon the subject are there collected.

calculated to intrench on the statute of frauds, by making one man collaterally answerable in effect for the debt of another, without any promise in writing; which would lead to dangerous consequences. That though if there had been positive evidence of fraud the defendant could not have screened himself from the consequences by adding that what he said was without prejudice to himself, yet at any rate it should have put the plaintiffs on their guard to have required further explanation, and was sufficient to rebut the implication of fraud.

LORD KENYON, C. J. Taking for granted that the case of *Pasley v. Freeman* was well decided, and that it gives the true ground of law by which cases of this sort must be governed, which is not now disputed, it makes an end of the present question. A new objection, however, is started, which, if well founded, would have applied equally to that case, namely, that this is an undertaking to answer for the debt of another, and not being in writing is void by the statute of frauds. That statute, however, has no relation to these cases. It raises certain legal presumptions of fraud from the want of certain formalities in contracts and other transactions, against which it guards by avoiding them: but that has no application to actions founded on actual fraud and deceit, in order to recover damages by the party grieved. In the present case, one man applies to another to know the character of a third person who offers to contract with him: that other need not have answered the inquiry at all, but if he do, he is bound in justice and common honesty to give a fair representation of what he knows. On the contrary, the defendant when applied to says, we know nothing of him ourselves; but "*we have a credit lodged with us by a very respectable house at Hamburg for 12,000*l.* which we hold at his disposal.*" Now, that representation was grossly false; for the instruction to the defendant was really no more than this, that *as soon as Thompson had lodged goods to the amount of 36,000*l.* in the defendant's hands, he was to give him credit for 12,000*l.** This in truth was totally different from the representation which the defendant made, and was calculated to give quite a different colour to the transaction. This was so plain that it could not even be stated to a jury on the part of the defendant at the trial, that a merchant in business could have made such an omission in the representation made by him from mere negligence; but the fact itself was denied, and the jury believed the plaintiffs' witness. It is no answer to say, that the defendant had no interest in making the false representation: it is immaterial to the cause of action whether he had or not^(a).

GROSE, J. It has been already decided in *Pasley v. Freeman* that an action will lie for making a false representation of a person's character in order to deceive another who inquires for information concerning it. The action, it was there holden, is founded on fraud, and on no other ground can it be maintained. If then the question of fraud were submitted to the jury, there can be no doubt but that it was competent to them on this evidence to have found that fact against the defendant. And from the course which the trial took, that seems to have been the case.

LAWRENCE, J. There is abundant evidence to shew that the defendant so conducted himself upon this occasion as to enable the plaintiffs to maintain their action. The case proved was not that something inadvertently slipped from the defendant in conversation, without attention to what he was saying; but the fact was, that *Thompson* having a credit upon the defendant to a certain amount, in consequence alone of his having deposited goods to a much greater value, was represented by the defendant as a person generally entitled to credit; which it is plain was not warranted by the true nature of the transaction when fairly explained. The law as laid down in *Pasley v. Freeman* was adverted to, and not controverted at the trial; but the only defence then

(a) Vide *Pasley v. Freeman*, S. P. [also *Hort v. Tallmadge*, 2 Day's Ca. 381.]

attempted was, that the fact itself of the information being suppressed was not true; impliedly admitting that if it were true, the evidence was sufficient to warrant a verdict for the plaintiffs. After this it is rather unprecedented to move for a new trial on a ground which made no part of the defence before the jury, but was in effect conceded at the time.

Rule discharged(1)(2).

D'Argent v. Vivant otherwise Taylor.

1 East, 330. Feb. 11, 1801.

The affidavit to hold to bail is part of the process to bring the defendant into court; any irregularity in it must be taken advantage of in the first instance, and is waived by the defendant's putting in bail. Such affidavit ought to give the addition as well as place of abode of the party making it.

Upon a rule to shew cause why the bail-bond given to the sheriff should not be delivered up to be cancelled, and an *exoneretur* entered on the bail-piece, on the defendant's filing common bail; which rule was obtained on the ground of a defect in the affidavit made to hold the defendant to bail, the same having been made by the plaintiff without giving herself any addition, but only describing herself by the place of her abode: The facts were, that the defendant having been arrested by process returnable the first return of the term grounded upon this affidavit, put in bail on the 27th of January, and made this application on the next day but one, the 29th.

After *Jervis* had been heard in support of the rule, who relied on *Jarret v. Dillon*(a); and *Barrow* against the rule, who cited *Jones v. Price*(b);

The Court took time to consider of the cases with a view to settle the practice in future; and now Lord *Kenyon*, C. J. delivered their opinion. After stating the rule and the facts above mentioned; he proceeded as follows:

That the affidavit is defective for want of such addition cannot be disputed:

(1) Though the action on the case grounded on fraudulent misrepresentations by persons not parties to the contract is modern in point of circumstance, deriving its origin from *Pasley v. Freeman*, yet in principle it harmonizes with the old action of deceit between the contracting parties. To support the action in either case there must be fraud in the defendant, and damage to the plaintiff. Fraud may consist in the suppression of what is true, as well as in the assertion of what is false; but in all cases an intention to deceive is essential. If damage results to the plaintiff, it is immaterial whether the defendant has received, or ever contemplated, any advantage to himself. These positions are established by the following cases, in addition to *Pasley v. Freeman* and the case in the text: *Scott v. Lara*, Peak's Ca. 226. *Haycraft v. Creasy*, 2 East 92. *Tapp & al. v. Lee*, 3 Bos. & Pull. 267. *Burton v. Lloyd*, 3 Esp. 206. *Hamar v. Alexander*, 2 New Rep. 241. *Ward v. Center*, 3 Johns. Rep. 271. *Upton v. Vail*, 6 Johns. Rep. 181. *Young & al. v. Cowell*, 8 Johns. Rep. 23. See also the observations of Lord Chancellor *Erskine* upon this action in *Clifford v. Brooke*, 13 Ves. Jan. 133.

In *Hutchinson v. Bell*, 1 Taun. 558, the question principally was as to the extent of the defendant's liability with respect to goods sold after the first parcel had been paid for. It was held, that the defendant's liability was not limited to the first parcel; but yet that he was liable only within a reasonable time, and to a reasonable amount.

In this action, the person whose credit is misrepresented, is a competent witness for the plaintiff. *Richardson v. Smith*, 1 Campb. 277. *Wise v. Wilcox*, 1 Day's Ca. 22. *Burton v. Lloyd*, 3 Esp. 207.

(2) [Fraud in the defendant, and damage to the plaintiff, are the gist of the action for a deceitful representation that a third person is entitled to credit. Deceit will not lie against a person making an untrue representation to another, on the faith of which the hearer acts, and thereby incurs damage, if the party making the representation did not know it to be untrue. Where the affirmation is merely a rude assertion or matter of opinion, leaving the other party open to exercise his own judgment or make his own enquiries, the action cannot be maintained. *Tryon v. Whitmarsh*, 1 Metcalf, 1. *Freeman v. Baker*, 5 B. & Ad. 797. 3 Bulst. 94. *Vernon v. Keys*, post. 13 East, 632 and the notes. *Morgan v. Bliss*, 2 Mass. 111. *Patten v. Girney*, 17 do. 152.—W.]

(a) Ante, 18.

(b) Ante, 61.

The Rule of Court of Mich. 15 Car. 2. expressly requires "that the true place of abode, and true addition of every person who shall make affidavit in court here, shall be inserted in such affidavit." Several instances have lately occurred where defendants have been discharged on filing common bail, because the affidavit to hold to bail was defective in not stating the addition of the party making such affidavit as required by this rule of Court. And in the case of *Jarret v. Dillon*, in this court in the last term, 1 East's Rep. 18., the Court, on argument by counsel, made a rule absolute for entering a common appearance for the defendant on a like defect in the affidavit to hold to bail. But it has been contended in the present case, that admitting the affidavit to hold to bail to be defective, yet the Court ought not now to interpose, the application having been made too late, being the day after the defendant had put in bail: that this objection is to be considered in the nature of an objection to process, which the defendant may make before putting in bail or entering an appearance; but that by putting in bail a defendant waives every objection to the process. In the case which has been already alluded to of *Jarret v. Dillon* in the last term, one objection made by the plaintiff against the rule was, that it was not competent to the defendant to take any objection to any proceeding in this cause till he had appeared in court by putting in good bail: but the Court, notwithstanding that objection, made the rule absolute; thereby clearly deciding that this was to be considered as an objection to process which may be taken by a defendant before he has appeared or put in bail. In *Norton v. Danvers*, Mich. 38 Geo. 3. in this court, 7 Term Rep. 375., the defendant being informed that a writ had been taken out against him on the 27th June, he gave a bail-bond; and in *Michaelmas* term following he obtained a rule to shew cause why the bail-bond should not be delivered up to be cancelled, on the ground of the affidavit to hold to bail being defective in not stating that no offer had been made to pay the debt in bank-notes. On shewing cause against the rule the plaintiff relied on the defendant having waived all objections to the bail-bond; first, because he had not objected in last *Trinity* term; and secondly, because he had voluntarily given the bail-bond. In answer it was said, that the defendant had not waived his right to take advantage of the objection, either on account of the time which had elapsed since the bail-bond was given, it having been given only a few days before the end of the last term; or on account of his having voluntarily given the bail-bond; that having been given merely to prevent the arrest. And, secondly, that this was a defect in the proceedings themselves which the defendant could not waive and not simply an irregularity in the mode or time of proceeding. But the Court said that the affidavit to hold to bail was only process to bring the party in, and if he chose to waive any objection to that, he may do it: and that in this case he had waived taking advantage of the objection. If indeed the defendant had been actually under arrest at the time, his consent to give a bail-bond would not have been binding on him, because it might be considered as given under duress; but here he voluntarily gave the bail-bond. In *Chapman v. Snow*, in C. B. Mich. 38 Geo. 3. 1 Bosanquet and Puller's Rep. 132, the defendant was arrested on 5th August; he had put in and perfected bail above, and a plea had been demanded; and on the 18th of November, a rule was obtained to shew cause why an *exoneretur* should not be entered on the bail-piece, and a common appearance allowed, on an omission in the affidavit to hold to bail in not denying a tender in bank-notes. On shewing cause, it was alleged that the defendant had waived any irregularity in the affidavit; 1st, by putting in bail above; 2dly, by delaying to apply to the Court till the 18th of November, twelve days after the commencement of the term. It was answered on the part of the defendant, that it was impossible for him to make this application till he was regularly in court, which he was not till he had put in and perfected bail. Mr. Justice Heath and Mr. Justice Rooke, who were the only judges in court when cause

was shewed against the rule, held that the defendant had waived the irregularity, and discharged the rule. On the next day, Lord C. J. *Eyre* said, "My brothers have mentioned to me a rule for entering an *exoneretur* on the bail-piece, and allowing a common appearance, which was yesterday discharged, and I think properly discharged. The defendant is not now in custody: he has put in bail; and is therefore too late to make this application. If he were to be allowed to move now, I do not see why he might not be at liberty to move after proceedings commenced against the bail. Perhaps the plaintiff has proceeded against them, and is very near judgment; for any thing I know he may have got judgment: Where then is the Court to stop? Here the process is bad: the party does not come in the first instance, but does a voluntary act by perfecting special bail: the cause goes on, with a total disregard to what is passed; the bail to the sheriff are discharged, and the whole of that proceeding is gone: Shall the defendant now be allowed to apply to us to discharge the special bail, and introduce common bail in their place? I think he should not be heard." In *Jones v. Price*, Michaelmas term 41 Geo. 3, in this court, 1 East's Rep. 81., the defendant had voluntarily put in special bail at the return of the writ, justified the bail although not excepted to, and drawn up the rule for the allowance and served it on the plaintiff: within a week after which he obtained a rule to shew cause why an *exoneretur* should not be entered on the bail-piece, on an objection to the affidavit to hold to bail, that it did not negative a tender of the debt in bank-notes. It was answered on the part of the plaintiff, that the defendant had waived any informality in the process by the above steps which he had taken. To which it was replied for the defendant, that this was an application on the part of the bail, who were obliged to justify before they could be heard; and they had taken the objection in reasonable time afterwards. But the Court said, that this was a clear waiver of the objection; that application should have been made in the first instance before the bail had justified: instead of which the defendant had lain by, and suffered the plaintiff to incur additional expence on a supposition that all the proceedings were right, and then came to complain. But he had adopted the process, and should not then take advantage of any defect in it. These several authorities shew that in this court, as well as in the Court of Common Pleas, the affidavit to hold to bail is to be considered as part of the process to bring the defendant into court; that an irregularity in it must be taken advantage of in the first instance, and may be done before bail put in or appearance entered: That such irregularity may be waived by a defendant; and is considered as having been waived when a defendant has voluntarily done an act submitting to such process, instead of taking steps to avail himself of such irregularity, which ought always to be done in the first instance. Here the defendant put in bail on the 27th of January, four days after the commencement of the term, during which time he might and ought to have taken the objection to the regularity of the affidavit under which he had been holden to bail. We are therefore of opinion that he has waived this objection. The consequence is; that this rule must be discharged.

Maanss v. Henderson and Others.

1 East, 335. Feb. 11, 1801.

Where an English subject in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was *neutral*; this is a sufficient indication to the broker that the party acted as *agent* and not on his own account, and therefore the broker has no lien on the policy so effected for his general balance against such agent, as between such broker and the principal.

IN *assumpsit*, the case was, that the plaintiff, being a *Prussian* residing at

Stetin in Prussia and owner of the ship *Gustav*, consigned the said ship in 1796 to *Jennings* of *Liverpool*, with orders to charter her with salt on the plaintiff's account from *Liverpool* to *Riga*, and to effect an insurance thereon. *Jennings* opened the policy in the usual way in his own name with the defendants, who were brokers residing in *Liverpool*, with whom he had before been in the habit of effecting insurances on account of others as well as for himself. Nothing was said by *Jennings* on this occasion whether the policy were opened on his own or any other account, except that he said it was *neutral*; and the policy itself, though effected in the name of *Jennings*, was *warranted neutral*. This was done on the 14th of *October* 1796, and it was not till the 31st, after *Jennings* stopped payment, that he told the defendants that he was only an agent in this transaction, and named to him his principal, the present plaintiff. The ship sailed on the voyage insured, and meeting with bad weather an average loss was incurred, to recover which this action was brought. At the time of *Jennings*' failure he was indebted to the defendants on the general balance of accounts for premiums on this and other insurances to a greater amount than the average loss in demand in this action, and for which the defendants were accountable; and the question was, Whether they were entitled to retain in this action as having a lien on this sum in their hands for such general balance as between them and *Jennings*? At the trial at the last Sittings at *Guildhall* the jury, by the direction of Lord *Kenyon*, found a verdict for the plaintiff for the amount of the average loss, deducting the amount of the premium upon this policy; his lordship being of opinion that the information conveyed by *Jennings* to the defendants at the time, that the interest was *neutral*, was a sufficient indication to them that he was only acting as agent for another in that transaction, though the principal's name was not then disclosed; and consequently, that the defendants had no lien upon the policy against the plaintiff for their general balance against *Jennings*, but only for the amount of the particular premium. A rule *nisi* having been obtained for setting aside the verdict and granting a new trial, on the ground of a misdirection in this respect;

Erskine, Park, and Yates, in shewing cause against the rule, urged that the direction to warrant *neutral*, confirmed also by the name of the ship being foreign, was equivalent to positive information that *Jennings* was only acting as agent for another; as it could not be supposed, if he were acting on his own account, that he should do that which would prevent him from recovering in case of a loss; and that this took the case out of the rule in *George v. Clagget*, 7 Term Rep. 359, that if a factor under a *del credere* commission sell goods as his own, and the buyer know nothing of the principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal.

Gibbs and Carr, in support of the rule, insisted that the mere direction to warrant the property *neutral* was not conclusive that *Jennings* had no interest in it which he might cover by the insurance. He might have advanced money to the principal for the purchase of the cargo on his account, for which, though the property would thereby become *neutral*, *Jennings* would have had a lien on the policy; or he might have had such lien for his general balance. At any rate, the principal not being disclosed, it must be considered that the credit was given by the defendants solely to *Jennings*.

LORD KENYON, C. J. said, that he remained of the same opinion as at the trial. If the agent disclose his principal at the time, it is clear that he cannot pledge the property of such principal to another with whom he is dealing for his own private debt. It is true, that he did not name him at the time, but he did in effect the same thing by saying it was for a *neutral*. Supposing the agent had said to the defendants, it is true I am agent for a foreigner, but nevertheless you may retain the money due to him for my debt; could such a transaction be sustained? But that which is now contended for is in

effect the same thing. All therefore that the defendants can retain for is the amount of the premiums due on this policy on the part of the plaintiff.

Per Curiam,

Rule discharged(1).

Butler v. Butler.

1 East, 338. Feb. 12, 1801.

Process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained entitles the king's execution to have priority within the stat. 33 H. 8, c. 39, s. 74, before the execution of a subject, whose execution had issued and been commenced on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the commencement of the king's process: the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution.

THE following rule was obtained in this cause on a former day of this term: "Upon reading the affidavit of *Luke Turner*, it is ordered, that the plaintiff, upon notice of this rule to be given to his attorney and the Solicitor of Excise, shall on, &c. shew cause why the sheriff of the county of *Buckingham* should not be at liberty to pay into court the money now in his hands levied under the writ of *fieri facias* issued in this cause, after deducting poundage, &c., for the use of the person or persons who shall be found entitled to the same, and that in the mean time proceedings against the said sheriff be stayed." The affidavit referred to stated, that a writ of *fi. fa.* issued at the suit of the plaintiff, dated 3d *November* 1800, and returnable the 15th, which was delivered at the office of the under-sheriff in *Aylesbury* on the 5th, to levy 704*l.* 4*s.*, on which a warrant was granted the same day, and the defendant's goods taken in execution under it, but for want of buyers, remained in the hands of the sheriff till after the return of the writ, who returned accordingly. That an extent(a) at the suit of the crown issued out of the Court of Exchequer upon a judgment recovered there against the defendant, tested the 15th of the said *November*, and returnable the 28th, which was delivered at the sheriff's office on the 17th, whereupon a warrant was granted to levy 500*l.* That a writ of *venditioni exponas* at the instance of the plaintiff issued on the 26th of *November*, returnable on *Friday* next after eight days of *St. Hilary*, and was delivered at the sheriff's office on the 29th, and the goods sold under it for 148*l.* 6*s.* That the landlord of the premises had also made a demand for rent due; and that the sheriff was desirous to pay over the money in his hands to whoever should appear legally entitled; both the plaintiff and the solicitor for the Excise having refused to indemnify him, and the plaintiff having ruled him to return the writ of *venditioni exponas*.

On the other hand, on shewing cause on the part of the crown it appeared that the plaintiff's execution issued upon a judgment entered upon a warrant of attorney to confess judgment given just before. That a subpoena issued between the 1st and 3d of *November* last on the part of the king against the defendant, on a prosecution directed by the commissioners of Excise for penalties under the paper act (34 Geo. 3. c. 20.) tested 12th *February* 1800, returnable 30th of *April*. That on the 9th *July* following, the crown obtained a verdict in the Exchequer for one penalty of 500*l.*, and on the 14th *November* final judgment was entered up. That a writ of execution issued thereon on the 17th, tested the 15th, and returnable on the 28th of *November*, which was delivered to the sheriff on the 17th; to which he returned specially, stating the former proceedings, that he had sold all the defendant's goods under the writ

(1) Vide *Man v. Shiffner & al.* 2 East 523. *Snook & al. v. Davidson & al.* 2 Campb. 216. *Langon v. Blanchard*, 2 Campb. 597.

(a) Properly, an execution at the suit of the crown.

of *venditioni exponas* issued at the suit of the plaintiff in this cause, and that the defendant on the 15th of *November* last, or afterwards, before the return of the extent, had no other goods on which he could levy.

Erskine, on the part of the sheriff, referred to *Rorke v. Dayrell*(a) where it was determined that after goods had been taken in execution on a *fi. fa.* at the suit of a subject against the king's debtor, and before they were sold, an extent at the king's suit grounded on a bond-debt tested after the delivery of the *fi. fa.* to the sheriff came too late. But that at any rate, if there were any doubt in this case, the question between the plaintiff and the crown ought not to be litigated at the expence of the sheriff, who therefore desired to pay the money into court.

Espinasse, on the part of the plaintiff, contended, that the crown was not entitled to any priority in this case; for the statute 33 H. 8. c. 39. s. 74, only directs, that if any suit be commenced or process awarded "for the recovery of any of the king's debts," that such suit or process shall be preferred before the suit of any person: and that the king shall have first execution against any defendant of and for his said debts before any other person; so always that the king's said suit be taken and commenced, or process awarded for the said debt, &c. before judgment given for the said other person. Now here, though the king's process had commenced before the plaintiff's judgment, yet it was not for a debt but for a penalty; and it was not ascertained to be the king's debt till the judgment obtained in the Exchequer on the 14th, which was after the commencement of the plaintiff's execution; and consequently the king could not insist on his priority according to the determination in *Rorke v. Dayrell*.

Law and Wood, on the part of the crown, suggested that the whole proceeding on the part of the plaintiff, who was the defendant's brother, was a collusion between him and the defendant to defeat the crown of the fruits of its prosecution against the latter: and in answer to a question from the Court whether there were any case of this sort concerning the priority of the crown's suit in respect of penalties) they cited the following case as decisive of the legal objection.

"The Attorney-General against *Aldersey*(b). This was an Exchequer information filed against the defendant, a sheriff, for making a false return of *nulla bona* to an execution on a judgment after verdict on an Exchequer information against *Thomas Harris*, a soap-maker, for excise penalties. The cause was tried at the sittings after *Mich.* term 1795, and the jury gave a verdict for the crown: but a special case was reserved for the opinion of the Court upon the question, Whether under the circumstances the king ought to recover the damages for which the verdict was given? Previous to the issuing of the crown's execution, and at the time of its delivery to the sheriff, his officer was in possession of *Harris's* effects under a *fi. facias*, at the suit of a subject. The Excise board, in conformity to the invariable practice, having refused to give the sheriff an indemnity, he appropriated the whole of the defendant *Harris's* effects in satisfaction of the subject's *fi. facias*; and returned *nulla bona* and *non est inventus* on the crown's execution. But the Excise Exchequer information having been filed prior to the commencement of the subject's action, (which was a judgment entered up on a warrant of attorney to confess it,) the Court, after three very long and solemn arguments, on 26th *November* 1796, adjudged the crown to be entitled to the goods.

"*Eyre, B.* I suppose there can be no doubt that the sum recovered by the judgment against *Harris* is a debt upon which an action of debt may be

(a) 4 Term Rep. 402. Vide also *Upham v. Sumner*, 2 Blac. Rep. 1294.

(b) The counsel for the crown were furnished with this note of the case, which they shortly referred to.

"maintained. When therefore the crown is enabled to recover ~~in an action~~ of debt, it seems to me difficult to say that the suit is not to recover a debt. "I really think this is a case in which the matter of fact decides the point. "It being a judgment on the ground of a preceding forfeiture, that forfeiture constitutes a debt recoverable by an action of debt; then is not the action by which it is recovered a suit for the recovery of a debt?

"Lord C. B. SKYNNER. If my brothers clearly consider the case in that light, I can have no hesitation to give my opinion upon it immediately; which is, that the money became a debt which has been so recovered by that suit. "The crown was entitled to priority of execution independent of the statute of Hen. 8. Then whatever alteration that statute may have made, it certainly has said, that wherever the king's suit has been commenced for a debt before the subject has obtained judgment, the king shall have the priority of execution. Now here the suit had been so commenced in which judgment was recovered, which made that a debt for which the execution issued. The case then comes within the words of the statute, adopting the construction which has been put upon it, that it abridged the prerogative; for this was a debt prior to the judgment obtained by the private creditor.

"EYRE, B. In truth, a right to the specific sum from the party attached in the crown upon the crown's instituting its suit, though not before; for till then another person might have interposed his suit, in consequence of which a right to a part of that sum would have attached in him. But that is excluded by the crown's having instituted the suit in the present case. Consider the nature of the right which so attaches; it is to demand from the party a specific sum of money. Had that sum been due upon a contract, it would have been a debt, in the ancient idea of a debt. But though due and recoverable from the party upon another ground, it certainly becomes a debt, because it is allowed to be recovered in the shape of a debt. The crown recovers it upon a ground which existed prior to the demand, and which is in consideration of law a ground for that demand, without any conviction or previous ascertaining of the forfeiture. It seems to me as if the argument used on the part of the defendant would go to this, that this sort of action could not have been commenced by a common informer, or by an information, by the crown, until the ground of forfeiture had been constituted in some other mode of proceeding. If it were only upon the forfeiture being ascertained that the right of action accrued or the debt was created, it must have been ascertained in some other mode, as by indictment for the offence, or in some other manner; for that seems the only way in which the case can be brought to an analogy to the case of forfeiture. But instead of that, the law authorizes the crown or a party to demand this as a sum of money due to them, and make, not the judgment, but the fact of the forfeiture, the ground of this duty, as it may almost be called. It becomes a duty, as soon as the crown's right to it has attached by the crown's having instituted its suit. The only reason why it is not a duty before that time is because it may go to one or another person. It is indeed incident to the nature of this demand, that if the party die before judgment is obtained the suit is abated: but I do not see that that circumstance alone is a reason why that which is recoverable in an action of debt is not a debt: it is a debt of a peculiar sort, a debt liable to be defeated, and not transferrable before judgment: it is a debt arising out of a personal transaction; a debt which by possibility, if not pursued up to judgment, may never take effect for the benefit of the party who sues: but as soon as it has been pursued up to judgment, there is an end of all those circumstances which counsel have raised in the question with regard to what is the true nature of this demand; it is then ascertained and fixed beyond all possibility of doubt. That however goes only to the remedy: the remedy for the recovery of this sort of debt is liable to be defeated by the accident of the parties dying before the judgment is obtained. I do not

"see that that which as soon as the judgment is pronounced is confessedly a debt, upon which all the ordinary remedies which the crown has for the recovery of a debt would immediately attach; and which proceeds upon a ground of fact existing before the suit is commenced, and which is made the ground upon which the suit is commenced; I do not see that it is not just as much a debt in the idea of law as a debt which is created by contract. It seems to me that it is impossible to dispute upon the face of this record that this is not a debt; because upon this record, which is after judgment, none of those subjects which could create a question upon it are open: they are all concluded. Here is a demand against this person proceeded upon till it is impossible it can be evaded; it is recovered, and being recovered, it is a debt: so it comes within the letter of the act. I think we should establish a mischievous precedent if we were to say, that this class of debts were not debts upon which the king is entitled to his preference, if the suit commenced before the subject's judgment; because though in this particular case there may not be a fraud, yet it would be open to practices; and the answer to that, that it is always open to the question of fraud by alleging fraud, would involve the revenue in high doubt and inextricable difficulties; and therefore I am not sorry that the Court sees a ground upon which it can determine against the subsequent judgment, which will not expose those prosecutions to be dealt with in that sort of way which the ingenuity of gentlemen who are concerned in defending causes of this sort, I am afraid, would be apt to make very effectual. *Hotham, B. and Perryn, B.* declared themselves of the same opinion."

Lord KENYON, C. J. said, that the case cited had removed the only doubt which had floated in his mind. And accordingly (the other Judges concurring)

The Rule was discharged.

The Court at the same time intimating to the sheriff's counsel, that it would be better for him to pay over the money levied in his hands to the crown without further litigation and expence.

Burton v. Harrison.

1 East, 346. Feb. 12, 1801.

Where plaintiff withdraws his record after entering it for trial, the defendant may have judgment as in a case of a nonsuit.

THE common rule for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice, having been moved for in this case,

Wood shewed cause against it; insisting that by the practice of the Court it could not now be granted, the plaintiff having taken down the record to trial and entered it, though he had afterwards withdrawn it. And he cited *King v. Pippet*, 1 Term Rep. 492, where the plaintiff having been nonsuited, which nonsuit was afterwards set aside on a point of law, the Court ruled that judgment as in case of a nonsuit could not be entered on the plaintiff's neglecting to carry the record down to trial a second time, where the defendant might have carried it down by proviso. So in *Mewburn v. Langley*, 3 Term Rep. 1, where the case was made a *remanet* after being entered for trial, the Court refused the like rule for not proceeding to trial the second time, because the stat. 14 Geo. 2. c. 17, was satisfied by the plaintiff's having once carried the record down to trial.

GROSE, J. The words of the statute are, that where the plaintiff "shall neglect to bring such issue on to be tried" the Court may give the defendant the like judgment as in case of a nonsuit. But how can it be said that the plaintiff brought the issue on to be tried when the record was withdrawn.

LE BLANC, J. The very point has been already expressly decided in a case of *Reed v. Stone*, E. 36 Geo. 3(a), where the record having been taken down to trial and entered, but afterwards withdrawn, it was objected that there could not be judgment as in case of a nonsuit: but the Court were of a different opinion upon the words of the statute, and granted the rule. The same point was taken for granted in two other cases; *Raines q. t. v. Spicer*, 7 Term Rep. 178, and *Jordaine and Others v. Sharpe*, 2 H. Blac. 280.

Wood thereupon consented to give a peremptory undertaking to try; on which terms it was agreed that the rule should be discharged.

Dayrell for the defendant.

In this term *William Mackworth Præd* Esq. of Lincoln's Inn was called to the degree of Serjeant at Law. His motto was "*Fæderis æquas dicamus leges.*"

CASES

IN

EASTER TERM,

IN THE FORTY-FIRST YEAR OF THE REIGN OF GEORGE III.

IN the course of the last vacation, the Great Seal was, on the resignation of Lord *Loughborough*, (afterwards created Earl of *Rosslyn*), immediately delivered to Lord *Eldon*, Lord Chief Justice of the Court of Common Pleas, who was appointed Lord High Chancellor of *Great Britain*. His lordship however continued to preside in the Court of Common Pleas till the appointment of his-successor, which did not take place till after this term: when

The Right Honourable Sir *Richard Pepper Arden* Knt. Master of the Rolls, was appointed to succeed him (having first resigned the Rolls) and was created a Peer, by the title of Baron *Alvanley of Alvanley*, in the County Palatine of *Chester*.

Sir *John Mitford* Knt., his Majesty's Attorney-General, resigned his office before the term, and was elected Speaker of the House of Commons; in whose room

Edward Law, Esq., one of his Majesty's Counsel learned in the Law, was appointed Attorney-General, and was knighted.

Sir *William Grant*, Knt. his Majesty's Solicitor-General, resigned at the same time, and was succeeded by

The Honourable *Spencer Perceval*, one of his Majesty's Counsel learned in the Law.

And after the term, Sir *Wm. Grant* was appointed to succeed Lord *Alvanley*, as Master of the Rolls, and was sworn of his Majesty's Most Honourable Privy Council.

Martin v. Vallance.

1 East, 350. April 24, 1801.

Where in trespass *qu. cl. fr.* the defendant pleads not guilty, and a justification of a right of way, and the plaintiff traverses the right of way, and new assigns *extra viam*; and there is a verdict for the plaintiff with 1s. damages on the new assignment, and for the defendant on the justification; the plaintiff is entitled to full costs, deducting the defendant's costs on the issue found for him.

THIS was a rule calling on the plaintiff to shew cause why the Master should not review his taxation of costs. The action was trespass *quare clausum fregit*: pleas, 1st not guilty, which was found for the plaintiff; 2dly, a justification of a right of way generally (not setting out the way by metes and bounds) over the *locus in quo*: replication, traversing the right of way, and new assigning *extra viam*: issues taken on the right of way, and on the

new assignment: verdict for the plaintiff on the new assignment, with 1s. damages, and for the defendant on the right of way. The Master taxed the plaintiff his full costs, deducting the costs of the issue found for the defendant; and the objection was, that the plaintiff was entitled to no more costs than damages. The question was first agitated on the last day of last term, when the Court ordered it to stand over till now.

Wigley in shewing cause, relied on *Asser v. Finch*(a) as in point; the only difference being, that the plaintiff only replied *extra viam*, admitting the right of way. But the reason given why the plaintiff should have his full costs was, because the title to the way was in question, namely, of *what extent* it was. The case of *Ibbotson v. Browne*, E. 11 Geo. 2. 4 to Barnes, 129, is the only authority which appears the other way; and there the plaintiff, who had a verdict on the new assignment, as here, had no more costs than damages. But it does not appear what the justification was in that case; it might only have been the common bar. The rule, however, adopted in *Asser v. Finch* has been recognized in subsequent cases; in *Beale v. Moor*, Tr. 16 Geo. 2, 2 Stra. 1168, and *Cockerill v. Allanson*, Tr. 22 Geo. 3, Hullock on Costs, 86; though a distinction was taken in the latter, that where the way pleaded is set forth by metes and bounds, the new assignment operates like a new action, and then the case amounts to no more than a common action of trespass with damages under 40s.; and so the plaintiff is not entitled to any more costs than damages, unless the Judge certified under the stat. 22 & 23 Car. 2. c. 9, s. 136, that the freehold or title to the land came in question. This case differs from that of *Griffiths v. Davis*, 8 Term Rep. 466, for there there was judgment by default on the new assignment, and all the pleas on which issues were taken, which were justifications for several rights of way, were found for the defendant.

Lawes, contra. The finding the justification for the defendant does away the finding of the first general issue for the plaintiff, and then the finding for the latter on the new assignment is no more than equivalent to a verdict in a new action of trespass, and consequently the plaintiff is entitled to no more costs than damages, 2 Vent. 180. 196. The case of *Ibbotson v. Browne* before alluded to is in point, that where there is a verdict for the plaintiff on the general issue, and for the defendant on the special justification, the plaintiff is not entitled to full costs.

LE BLANC, J. observed, that there was no new assignment in either of the cases in *Ventris*.

The Court on this day, after some further argument said, that after the practice had been so long ago settled by the case of *Asser v. Finch*, which had been followed up by subsequent determinations, it was now too late to depart from it.

Rule discharged.

Parker v. Elding.

1 East, 852. April 24, 1801.

Where a public statute for erecting a court of inferior jurisdiction enacts, that "no action for any debt not amounting to 40s. and recoverable by that act shall be brought against any person residing within the jurisdiction," &c. such statute is a defence upon the general issue to a party bringing himself within it, who is sued in the superior courts.

ASSUMPSIT for the depasturing of cattle, for work and labour, and on the common counts. At the trial before *Gross J.* at the last assizes at *Cambridge*, the plaintiff failed as to part of his demand, but proved himself enti-

(a) 2 Lev. 334. This and other cases on the subject are collected in *Hullock on Costs*, 86, &c.

tled to receive from the defendant 1*l.* 1*s.* for work and labour, and for agistment. The defence as to so much was, that the debt was contracted within the *Isle of Ely* by the defendant residing there, where the plaintiff also lived at that time, (though the latter had removed at the time of the action commenced;) and that by the stat. 18 Geo. 3. c. 36. (directed to be deemed a public act) for the more easy and speedy recovery of small debts contracted within the *Isle of Ely*, a court of requests is constituted, and it is enacted, "that no action or suit for any debt not amounting to 40*s.* and recoverable by "virtue of this act in the said court of requests, shall be brought *against any* "person residing or inhabiting within the jurisdiction thereof in any of the "king's courts of *Westminster*, &c. or elsewhere out of the said court of requests." In reply, it was urged on the part of the plaintiff at the trial, that, admitting that the above mentioned clause was strong enough to draw the subject matter of the action within the inferior jurisdiction, because the defendant resided there, although the plaintiff did not; which was contrary to the usual rule in such cases^(a); more especially as a subsequent clause gave treble costs against the plaintiff in case he was nonsuited or a verdict passed against him, a provision which seemed to imply that he also must reside within the jurisdiction; yet at any rate, such an objection to the jurisdiction could not be taken on the general issue, but ought to have been specially pleaded; for otherwise it is a surprise upon the plaintiff, as he might not know that the defendant lived within the peculiar jurisdiction at the time of the contract made. The learned Judge, however, thought the objection to the action well founded, and a verdict was taken for the defendant with liberty to the plaintiff to move to set it aside and enter a verdict for the 1*l.* 1*s.*, if the Court should be of a different opinion.

Wilson now moved for a rule for that purpose, upon the ground before stated.

Lord KENYON, C. J. Some acts of parliament, giving a peculiar jurisdiction, require that it shall be pleaded, in case the parties claiming the privilege shall be sued elsewhere; and others direct that a suggestion shall be entered on the roll; and in those cases the methods pointed out by the respective statutes must be pursued. But here is a general law, of which we are bound to take notice, which says, that no action shall be brought against any person residing within the jurisdiction for any debt not amounting to 40*s.*, and recoverable by virtue of that act. The demand in question is of that sort. How then can we say that the plaintiff shall recover it against the positive direction of the act? This being directed to be taken as a public act is part of the general law of the land, of which the plaintiff must be deemed to have notice, and therefore cannot object to being surprised. He must also know in fact with whom he contracted, and on what account.

Per Curiam,

Rule refused^(b).

(a) In *Webb v. Brown*, 5 Term Rep. 535, it was holden, that a citizen and freeman of London, not resident therein, having a demand under 40*s.* for goods sold against another citizen and freeman who is resident, is not bound to sue in the Court of Requests pursuant to the statute 14 Geo. 2. c. 10. But upon reference to that statute it will appear that the words of the enacting clause are very different from those in the present case, and that they only apply to cases where both the parties reside within the inferior jurisdiction. But it is sufficient to entitle a plaintiff to sue in the county court that the cause of action arises and the defendant resides within the county. *Welsh v. Troyle*, 2 H. Blac. 29, and *Webb v. Woodward*, 6 Term Rep. 175.

(b) In *Taylor v. Blair*, 3 Term Rep. 453, under a similar provision in an act of parliament creating a Court of Requests in *Westminster* for causes under 40*s.* which enacts that the defendant sued elsewhere may plead, &c. Lord Kenyon intimated an opinion, that even on the general issue, if the objection were made at the trial, the plaintiff might be nonsuited. In *Shipman v. Henbest*, 4 Term Rep. 109, it was not necessary to determine this point, because the Court there held that the jurisdiction of the superior courts was not taken away.

Reed v. Jackson.

1 East, 355. April 25, 1801.

A verdict against one defendant in trespass upon an issue of a justification of a public right of way, negating such right is evidence in trespass for breaking and entering the same close against another defendant who justified under the same right; and the latter cannot shew that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial; the record being conclusive as to the fact of such a finding, though not as to the truth of it between other parties.

TRESPASS for breaking and entering the plaintiff's close called *the Marsh*, situate at the parish of *Holme Cultram* in the county of *Cumberland*. Pleas, the general issue, and several justifications; 1. for a common public footway in, through, over, and along the *locus in quo*; 2. for a public carriage-way; 3. for an occupation-way to and from the defendant's house over the *locus in quo* to a certain bridge; 4. for a customary-way for all the inhabitants of a certain side of the parish to and from their respective dwelling-houses over the *locus in quo* to the same bridge, and from thence to the parish church. The replication traversed these several rights of way and new-assigned other trespasses *extra vias*. The rejoinder took issue on the several traverses, and pleaded the same justifications to the trespasses newly assigned, to which the plaintiff, protesting, &c. replied *de injuria*, &c.; on all which issues were taken.

At the trial before *Graham, B.* at the last Summer assizes at *Carlisle*, the plaintiff's counsel, in order to negative the existence of a public footway, tendered in evidence a record of another action brought by the same plaintiff against one *Brown* for a trespass in the same close described in the present declaration, to which amongst others there was a similar plea of justification for a common footway over the *locus in quo*, and another justification for a prescriptive easement to go upon the land to wash and shear sheep at the shearing time in right of a certain messuage, &c.; which justifications were traversed, and the issues thereon found for the plaintiff, negating the right of way, and the easement last mentioned. It was objected by the defendant's counsel, 1st, that the record was no evidence between these parties, being *res inter alios acta*; which objection being overruled, though the evidence was holden not to be conclusive, the defendant then offered to shew, that no evidence was entered into upon the trial of that cause respecting the issue upon the public footway, but merely as to the easement of washing sheep, and therefore that the finding of the jury upon the first was mistakenly indorsed on the postea. The learned Judge however rejected this evidence, and the plaintiff obtained a verdict.

Cockell, Serjt. in *Michaelmas* term last, obtained a rule, calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial granted: and in *Hilary* term the case was shortly touched upon by *Law* (now Attorney-General,) who insisted that the record in the former action was admissible in evidence against the present defendant, though no party thereto, the right claimed being for a public footway, which was matter of common notoriety. The case was ordered to stand over till this term: And

Park and *Littledale* were now called upon to support the rule who relied principally upon the case of *Lewis v. Clerges*(a) to shew that a verdict could not be given in evidence unless between the same parties; for otherwise a man would be bound by a decision where he had no opportunity to cross ex-

(a) A trial at bar, Easter term, 1700, *Gilbert's Law of Evidence*, 29. Vide *Sherwin v. Clerges*, Bull. Nisi Prius, 332.

amine the witnesses. But though it were admissible, at any rate it was competent to the defendant to shew that the indorsement on the postea was made by mistake of the officer; the matter of that issue respecting the footway having passed *sub silentio*, and the trial having altogether proceeded upon the issue respecting the easement of washing sheep.

LORD KENYON, C. J. I think the judge's direction was right upon both points. The record was admissible evidence, though between other parties, as to the finding upon the right to the public footway, which was negatived. The defendants in both cases stood in the same relative situation. In the case of customary commoners, a verdict in an action for or against one is evidence for or against another claiming in the same right. So in other cases (a) of public prescription. What weight the evidence is entitled to is another question; perhaps not too much; and certainly it was not conclusive. But the evidence offered by the defendant went to impeach the authenticity of the record as to the fact of such a finding, and therefore was not admissible.

GROSE, J. assented.

LAWRENCE, J. Reputation would have been evidence as to the right of way in this case; *a fortiori* therefore, the finding of twelve men upon their oaths.

LORD KENYON, C. J. agreed that reputation was evidence with respect to public rights claimed, as in this case; but not with respect to private rights.

LE BLANC, J. assented.

Rule discharged(1)(2).

Cary v. Longman and Reese.

1 East, 358. April 25, 1801.

An action lies to recover damages for pirating the new corrections and additions to an old work.

THIS was an action on the case for pirating a book of the plaintiff's. The first count of the declaration stated, that the plaintiff was the author of a certain book intitled, "*Cary's New Itinerary, or an accurate Delineation of the 'great Roads both direct and cross throughout England and Wales, &c. from 'an actual Admeasurement made by Command of his Majesty's Postmaster-General,' &c.*" and that being the author of the said book within fourteen years last past, he had published the same for sale, &c. That the defendants intending to deprive the plaintiff of the profit thereof, and of the benefit of his copyright, injuriously published and exposed to sale divers copies of a certain book intitled, "*A new and accurate Description of all the direct and principal 'Roads, &c. from a late actual Admeasurement made by Command of his 'Majesty's Postmaster-General,' &c. which same book had before that time been wrongfully and injuriously copied from the said book of the plaintiff, without his consent, &c.*" The second count laid it thus; *great part of which said book* had been before that time wrongfully and injuriously copied and pirated from the said book of the plaintiff, without his consent, &c. The third count laid, that the plaintiff was the proprietor of *Cary's Itinerary, &c.* The sixth count laid, that the plaintiff had the sole right of printing certain matters relating to the roads of this kingdom, &c. first published within fourteen years last past in a certain book of the plaintiff's called, &c.

(a) In the case of customary tolls, vide *The City of London v. Clerke*, Carth. 181.

(1) Vide Peake's Ev. 40, and the cases there cited. *Canaan v. Greenwood's Turnpike Company*, 1 Conn. Rep. 1, 7, 8, 9.

(2) [The same point substantially was decided in the following cases, viz. *Briscoe v. Lomax*, 3 N. & P. 308. *Thomas v. Jenkins*, 1 do. 588. *Evans v. Rees*, 2 P. & D. 627. 10 Ad. & Ell. 151.—W.]

At the trial before Lord *Kenyon* at *Westminster*, it appeared that the original foundation of both the plaintiff's and defendant's books was a work first published in 1771, by Mr. *Patterson*, the copyright of which in 1783 (the author being then living) became vested in Mr. *Newberry*. This work had gone through several editions, the 11th of which was published in 1796. In 1797, the plaintiff was employed by the Postmaster-General to make an actual survey of the principal roads; and the book published by him with their permission contained many material corrections of and additions to the last edition of the original work by *Patterson*. The principal of these consisted in some corrections of distances by the actual surveys; in an admeasurement of the distances from inn to inn in the several post towns, in addition of those from one town to another; in an index to the roads more copious than the former one; in an additional number of gentlemen's seats by the road side; in a rejection of some routs, and an addition of many others. On the other hand, the work published afterwards by the defendants as the 12th edition of the original work by *Patterson* appeared to have been copied, nine tenths of it, *verbatim* from the plaintiff's improvements, and many of the alterations merely colourable. After verdict for the plaintiff,

Gibbs moved for a new trial on the ground that the stat. 8 Ann. c. 19 s. 1., granting the copy-right to authors for a certain time, only enacts, "that the author of any book and his assigns shall have the sole liberty of printing such book for 14 years," &c. And though he could not deny that the defendants had copied the alterations of and additions to the original work, introduced by the plaintiff in his Itinerary, in the same manner as he himself had copied the original work, yet he could not be considered as the author of the book within the meaning of the statute, the greater part of it having been before published by another person, and to which the plaintiff had no title.

LORD KENYON, C. J. Certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. *Patterson's*; but it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable; and the defendants are answerable at least for copying those parts in their book. That the defendants had pirated from the plaintiff's book was proved in the clearest manner at the trial; nine tenths at least of the alterations and additions were copied *verbatim*. The printed work itself was made use of by the defendants at the press, some of it clipped with scissors, with a few slips of paper containing MS. additions interspersed here and there, and some of these merely nominal and colourable. The courts of justice have been long labouring under an error, if an author have no copy-right in any part of a work unless he have an exclusive right to the whole book. I remember it was thought otherwise in the case of Mr. *Mason* (*Mason v. Murray*). Several of Mr. *Gray's* Poems had been for many years before published, which were collected by Mr. *Mason*, and published with the addition of several new poems: but though he had not a property in the whole book, yet the defendant having copied the whole, the Lord Chancellor(a) granted an injunction against him as to the publication with the additional pieces. So Lord *Hardwicke* in another case(b)

(a) Lord *Qu. Bathurst*.

(b) *Tonson v. Walker* and another 30th April 1752, cited in *Millar v. Taylor*, 4 Burr. 2325. 2358. and in *Tonson v. Collins*, 2 Blac. 832.

Vide *Motte v. Falkner*, Nov. 1785, before Lord *Talbot*, cited in 4 Burr. 2358. and in 1 Blac. Rep. 331, and *Carnan v. Bowles*, 2 Bro. Ch. Cas. 80, relative to the original publication in question.

SAYNE and others v. *MOORE*, Sittings after Hil. 1785, at Guildhall, cor. Lord Mansfield, C. J.—This was an action for pirating sea charts; which are protected by statute 71 Geo. 3. c. 57. The charts which had been copied were four in number, which *Moore* had made into one large map.

It appeared in evidence that the defendant had taken the body of his publication from the work of the plaintiffs, but that he had made many alterations and improvements thereupon. It was also proved, that the plaintiffs had originally been at a great expence in procuring

granted an injunction to restrain the defendants from printing *Milton's Paradise Lost*, with *Dr. Newton's Notes*; although there was no doubt but that they were at liberty to have published the original work itself without the notes,

Per Curiam,

Rule refused (1)(2).

materials for these maps. *Delarochett*, an eminent geographer and engraver, had been employed by the plaintiffs in the engraving of them. He said, that the present charts of the plaintiffs were such an improvement on those before in use as made them an original work. Besides their having been laid down from all the charts and maps extant, they were improved by many manuscript journals and printed books and manuscript relations of travellers: he had no doubt the materials must have cost the plaintiffs between 3000*l.* and 4000*l.*, and that the defendant's chart was taken from those of the plaintiffs, with a few alterations. In answer to a question from the Court, Whether the defendant had pirated from the drawings and papers, or from the engravings? he answered, from the engravings. *Winterfelt*, an engraver, said he was actually employed by the defendant to take a draft of the Gulph Passage, (in the West Indies) from the plaintiffs' map.

Many witnesses were called on behalf of the defendant, amongst others a *Mr. Stephenson* and *Admiral Campbell*. *Mr. Stephenson* said he had carefully examined the two publications; that there were very important differences between them, much in favour of the defendant's. That the plaintiffs' maps were founded upon no principle; neither upon the principle of the Mercator, nor the plain chart, but upon a corruption of both. That near the Equator, the plain chart would do very well, but that as you go further from the Equator there you must have recourse to the Mercator. That there were very material errors in the plaintiffs' maps. That they were in many places defective in pointing out the latitude and longitude, which is extremely essential in navigating. That most of these, as well as errors in the soundings, were corrected by the defendant. *Admiral Campbell* observed, that there were only two kinds of charts, one called a plain chart, which was now very little used; the other, which is the best, called the Mercator, and which is very accurate in the degrees of latitude and longitude. That this distinction was very necessary in the higher latitudes, but in places near the Equator it made little or no difference. That the plaintiffs' maps were upon no principle recognized among seamen, and no rules of navigation could be applied to them; and they were therefore entirely useless.

Lord Mansfield, C. J. The rule of decision in this case is a matter of great consequence to the country. In deciding it we must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copy-right to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject. As in the case of histories and dictionaries: In the first, a man may give a relation of the same facts, and in the same order of time; in the latter an interpretation is given of the identical same words. In all these cases the question of fact to come before a jury is, Whether the alteration be colourable or not? there must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So in the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts; whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here, any more than in the other instances; but upon any question of this nature the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected even in a small degree, if it thereby become more serviceable and useful for the purposes to which it is applied. But here you are told, that there are various and very material alterations. This chart of the plaintiffs is upon a wrong principle, inapplicable to navigation. The defendant therefore has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it is a mere servile imitation, and pirated from the other, you will find for the plaintiffs.

Verdict for defendant.

Dr. TRUSLER v. MURRAY, Sittings after Mich. 1789, cor. *Lord Kenyon*.—This was an

(1) Vide *Roworth v. Wilks*, 1 Camp. 84.

(2) [The principles laid down by *Ld. Kenyon* in the text have been maintained in other cases in England. See *D'Almeida v. Boosey*, 1 Young, 288. *West v. Francis*, 5 B. & A. 787. *Roworth v. Wilks*, 1 Camp. 84. *Murray v. Elliston*, 5 B. & A. 637. This last case decided the performance of a dramatic work on the stage to be no publication within the British Statute. The performance of a manuscript play on the public stage was held, however, to be such a publication in *Morris v. Kelly*, 1 J. & W. 461. A second or subsequent engraving may be taken from the original picture, without thereby pirating the first engraving. *De Berenger v. Whible*, 2 Stark. C. 548.—W.]

Smith and others, Assignees of Richardson, a Bankrupt, v. Stokes.

1 East, 363. April 28, 1801.

After an act of bankruptcy committed by one of two partners, joint effects are sent away, which come to the defendant's hands; then the solvent partner dies, leaving the defendant his executor; and afterwards a commission of bankrupt is taken out against the surviving partner, and his estate assigned to the plaintiffs: held that they are tenants in common with the solvent partner, and after his decease with his representatives by relation of law, from the act of bankruptcy; and cannot therefore maintain trover against the defendant, aiming under such solvent partner.

IN trover for goods, to which the general issue was pleaded, a verdict was taken for the plaintiffs at the trial before Lord *Kenyon*, C. J. at *Westminster*, after last *Michaelmas* term, damages 24*l.* 4*s.*, subject to the opinion of the Court on the following case.

The bankrupt *Richardson* and one *Strickland* were partners in trade. On the 29th of *January* 1800, *Richardson* committed an act of bankruptcy. On the 31st of the same month, the goods in question, being partnership effects, were sent to *Monmouth* directed to A. and B., and were received by the defendant, and which before the action brought were demanded by the plaintiffs of the defendant, who refused to deliver the same. On the 8th of *February* 1800, a commission of bankrupt, on the petition of S. G. and others, who were creditors of *Strickland* and *Richardson*, was issued against *Richardson* only. On the 14th of the same month of *February*, *Strickland* died, having made his will, and appointed *Stokes* and *Weston* his executors, who have since proved the same. *Strickland* never committed any act of bankruptcy. On the 7th of *March* 1800 the commissioners acting under the commission of bankrupt against *Richardson* executed an assignment of his effects to the plaintiffs, who were duly chosen assignees. The question was, Whether the plaintiffs were entitled to recover in this action?

Turnor, for the plaintiffs, admitted, that if the defendant, as the representative of *Strickland* the deceased partner, stood in the relation of tenant in common of the property with the plaintiffs, the action could not be maintained: but he contended, that upon *Strickland's* death the whole legal interest in the partnership property, which was before then holden in joint tenancy, survived to the bankrupt his remaining partner, and was upon his bankruptcy transferred by the assignment to the plaintiffs; although by the law merchant they were accountable for a moiety to the representatives of the deceased partner. The property was originally vested in the two partners as joint tenants, and nothing happened during the life of *Strickland* to convert their title into a tenancy in common; for he died before the commissioners' assignment was made, and consequently before the bankrupt laws had attached upon the legal title of the bankrupt so as to destroy the joint-tenancy. The act of bankruptcy, which happened before *Strickland's* death, could not of itself operate to

action for pirating a book of Chronology. It was proved by the plaintiff, that though some parts of the defendant's work were different, yet in general it was the same, and particularly from page 20 to 34 it was a literal copy.

Lord *Kenyon*, C. J. was of opinion, that if such were the fact the plaintiff must recover, though other parts of the work were original. He said Lord *Bathurst* had been of the opinion and he thought rightly with respect to the publication of some original poems by Mr. *Mason*, together with others which had been before published. And the like with respect to an abridgement of *Cook's Voyage round the World*. The main question here was, Whether in substance the one work is a copy and imitation of the other; for undoubtedly in a chronological work the same facts must be related. The parties having received his lordship's opinion, it was agreed to refer the consideration of the two books to an arbitrator, who would have leisure to compare them.

dissolve the joint-tenancy, or sever the title of the parties, and convert it into a tenancy in common. This was evidently the opinion of the Court in *Fox and others assignees v. Hambury*, Cowp. 445, for they there held, that after a secret act of bankruptcy by one partner, the other still continued to have a control over the partnership effects, and might convey a title to a third person: whereas if the act of bankruptcy of one operated so as to convert the joint-tenancy into a tenancy in common, the solvent partner could only have made a title to a moiety. Lord Mansfield indeed there said, that the act of bankruptcy of one partner is to many purposes a dissolution of the partnership by virtue of the relation in the bankrupt laws; but that is merely to avoid all intermediate acts of the bankrupt himself to the prejudice of his creditors, and cannot vary the title by which he holds his property, and which must be governed by the general principles of law. It is the assignment under the statutes which dissolves the partnership, and that is effected by the actual transfer of the commissioners, who have themselves no interest in the property, but a bare power to transfer. If then before the assignment the joint-tenancy continued to subsist in point of law notwithstanding the act of bankruptcy, the whole legal title and right of action for any conversion of the property during the joint-tenancy survived to the bankrupt upon the death of his partner by the mere operation of the common law, Co. Litt. 198, though accountable to the deceased's representatives for a moiety of the beneficial interest, according to *West v. Skip(a)*: and that interest which devolved upon the bankrupt by operation of law after the act of bankruptcy, and before the assignment, passed by the commissioners' assignment to the plaintiffs, subject to the same account. The relation back of the assignment to the act of bankruptcy, in order to avoid mesne acts of the bankrupt, is by force of the bankrupt laws, and is quite distinct in its operation from the change of title effected in the property by such assignment, from a joint-tenancy to a tenancy in common, which results from the rules of the common law in consequence of the conveyance, and which has no relation back. But at the time of the assignment the whole legal interest was in the bankrupt, and consequently was all conveyed to the assignees.

Onslow, Serjt., contra, was stopped by the Court.

Lord KENYON, C. J. I do not understand how the assignees of the bankrupt could take the whole legal interest in this case, without which it is admitted that the action is not maintainable against the defendant. If indeed property be left in the hands of a bankrupt partner at the time of the bankruptcy, the assignees are entitled to take possession of the whole and sell it, but they must account for a moiety to the other partner. As in the case of *Heydon v. Heydon*, Salk. 392, where it was holden that under an execution against one or two copartners, the sheriff must seize all, and not merely a moiety of the goods sufficient to cover the debt; because the moieties are undivided, and he must sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner. In this case, it was not the act of bankruptcy alone that dissolved the joint-tenancy, but the act of bankruptcy followed up by the commission and assignment. Nothing passes to the assignees till the assignment; but when that is executed, they are in by legal relation to the time of the act of bankruptcy, according to *Cooper v. Chitty*, 1 Burr. 20, and many other cases. This is the essential object of the bankrupt laws, and the uniform operation of them, with the single exception of the king's prerogative in regard to extents against the bankrupt's property, which bind from the teste of the writ, and till the actual assignment of the commissioners; wherefore a

(a) 1 Ves. 242. See also *Martin v. Crum*, Salk. 444. 1 Ld. Ray. 840. Two joint merchants make B. their factor; one dies leaving an executor; this executor and the survivor cannot join; for the remedy survives but not the duty; and therefore on recovery he must be accountable to the executor for that.

provisional assignment is sometimes made in order to protect the bankrupt's property from the expected process of the crown. In all other instances the relation takes place. The effect of it then in this case is, that the assignees became tenants in common by relation from the time of the act of bankruptcy with the other partner in his lifetime, and since his decease with his representatives, one of whom is the present defendant: and then the rule of law attaches, that one tenant in common cannot maintain trover against another(1).
Per Curiam, Postea to the defendant(a).

Smith and Others, Assignees of Richardson, a Bankrupt, v. Oriell.

1 East, 348. April 28, 1801.

After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt and dies, and afterwards a commission issues against the surviving partner; held that the creditor by virtue of such delivery by the solvent partner became tenant in common of the goods with the assignees of the bankrupt by relation from the act of bankruptcy, which was in the life-time of the solvent partner; and consequently that the assignees cannot maintain trover against such creditor.

THESE were the same plaintiffs as in the last case, but the situation of this defendant was in some respect different from the other. The case here stated,

That on the 29th *January* 1800, the bankrupt was in partnership with *Strickland*, and they were possessed of partnership property, of which the goods in question in this action of trover are part; and as such partners, were in insolvent circumstances. That on that day, *Richardson* committed an act of bankruptcy by absconding. That on the 8th of *February* following, a commission of bankruptcy, on the petition of *S. G.* and others, who were creditors of *Strickland* and *Richardson*, was issued against *Richardson* alone. That on the 12th of the same *February*, the goods in question, being part of the aforesaid partnership property, were delivered to the defendant by the desire of *Strickland*, in satisfaction of several debts antecedently due to him from *Strickland*, and also from *Richardson*. That on the 14th of the same month, *Strickland* died. That on the 15th, the commissioners acting under the commission against *Richardson* executed a provisional assignment to the messenger, and on the 7th of *March* following, executed an assignment of the bankrupt's effects to the plaintiffs. That there was a demand and refusal of the goods.

Giles, for the plaintiffs, attempted to distinguish this from the former case, because the present defendant was a stranger, and not as in that case the legal representative of *Strickland* the partner of the bankrupt. And though in strictness the executors of the deceased partner ought to have been joined in the action with the plaintiffs, yet according to the case of *Addison v. Overend*(b), advantage can only be taken of the omission by a plea in abatement. But by

Lord KENYON, C. J. If *Strickland* delivered the property over to the defendant *bona fide* for a debt, which must be taken to be the case here, the latter stands in the same situation as *Strickland* himself would have done. By

(1) For the rule, and its limitations, see Litt. sect. 323. Co. Litt. 290. a. 2 Leon, 226, case 278. *Barnardiston v. Chapman & al.* Bul. N. P. 34, S. C. cited from Lord Ch. J. King's MS. in *Heath v. Hubbard*, 4 East, 121. *Holliday v. Cammell & al.* 1 Term Rep. 658. *Penninge & al. v. Lord Grenville*, 1 Taun. 241. *St. Johns v. Standing*. 2 Johns. Rep. 468. *Wilson & al. v. Reed*, 3 Johns. Rep. 175. *Seldon v. Hiccock*, 2 Caines, 166.

(a) Vide *Hague v. Rolleston*, 4 Barr. 2176, and vide the next case.

(b) 1 Term Rep. 766. That was trespass for running down a ship.

such a delivery without fraud the legal property was transferred ; and therefore there is no distinguishing this case from the former.

Per Curiam,

Postea to the Defendant,

Solomons v. Lyon.

1 East, 369. April 28, 1801.

To a plea of set-off of a sum due under a recognizance, and also of another sum upon a simple contract, it seems that a replication, protesting that the plaintiff did not acknowledge, &c. and then pleading that he was not indebted in manner and form as the defendant had in pleading alleged, and concluding to the country, is bad ; inasmuch as it refers matter of record to the cognizance of a jury. But as it was a sham plea, the plaintiff had leave to amend without payment of costs.

TO an action of *assumpsit* for 40*l.* the defendant pleaded, that before the commencement of the plaintiff's suit, and in the lifetime of one *M. R.* now deceased, and whom the defendant hath survived viz. in *Michaelmas* term, 37 Geo. 3. the plaintiff came in person into the court of Exchequer, &c. and then and there before the Barons acknowledged himself to owe to the said *M. R.* and the defendant 15*l.* 10*s.*, which said recognizance still remains in full force ; and the said 15*l.* 10*s.* at the time of the commencement of this suit, was, and still is, due and owing from the plaintiff to the defendant, as surviving partner of *M. R.*, as by the said recognizance *still remaining of record of the said court*, &c. fully appears. And the defendant further says, that the plaintiff at the commencement of this suit, was, and still is, indebted to him in other 26*l.* 5*s.* upon a certain order for payment of money made by the plaintiff to the defendant, &c. ; which said several sums of 15*l.* 10*s.* and 26*l.* 5*s.* exceed the several sums in the declaration mentioned and supposed to be due, &c. out of which the defendant is ready and offers to set off and allow to the plaintiff all the damages sustained by reason of the non-performance of the promises in the declaration mentioned, according to the form of the statute, &c. Wherefore he prays judgment, &c. Replication, protesting that the plaintiff did not acknowledge himself to owe to the said *M. R.* and the defendant the said sum of 15*l.* 10*s.* &c. in manner and form as the defendant has in his plea, &c. in that behalf alleged ; for replication says, that he the plaintiff is not, nor at the commencement of this suit was, indebted to the defendant in manner and form as the defendant hath above in pleading alleged, *and this he prays may be inquired of by the country*, &c. To this there was a special demurrer, assigning for cause that the plaintiff had concluded his replication, to the country, although the plea to which such replication was made is founded upon matter of record, and can only be tried by production or non-production of the record therein mentioned, &c. And also for that the plaintiff in his replication does not deny the existence of the record of recognizance in the said plea mentioned, nor in any way discharges himself therefrom.

Reader in support of the demurrer. The plea of set-off consists partly of matter of record, and partly of matter of fact ; the replication, therefore, by concluding to the country as to the whole, attempts to draw matter of record to the cognizance of a jury ; as to which the plaintiff should have replied *nul tiel record*. This cannot be distinguished from the common case, where the plaintiff declares in debt on a judgment and also on a bond ; there a plea of *nil debet* to the whole would clearly be bad. If the whole sum set off had been founded on the recognizance, the plaintiff must have replied *nul tiel record* ; then because other matter is joined to which *nil debet* is a good plea, that will not make it good for the rest to which it is no answer. If instead of there being but one plea, containing distinct matters there had been two distinct pleas, there must have been distinct and different replications ; then

the joining the two matters in one plea in order to avoid prolixity, will not alter the nature and substance of the replication in answer. But it may be argued, that this replication admits the recognizance, and only takes issue on the simple contract debt *ultra* the sum in the recognizance; that however is not warranted by the form of the pleading; for the plaintiff says, "that he "was not indebted to the defendant *in manner and form as the defendant hath above in pleading alleged*," which includes the whole. If the *protestando* had not been introduced, the replication would not have been an answer to the whole plea: but the *protestando* does not admit the sum due under the recognizance. Then because the replication is no answer to part of the plea, it cannot be taken to be an admission of so much. And he cited *Fursdon v. Weeks*, 3 Lev. 64.

Scott, contra, insisted, that under this replication payment might have been given in evidence which was triable by the country: but he also contended, that a recognizance not enrolled, which for aught appeared was the case here was not matter of record, nor pleadable as such, but was of no higher nature than a bond. *Bottomley v. Lord Fairfax*, 1 P. Wms. 334, and 2 Vern. 750.

Lord KENYON, C. J. observed, that the plea stated, "as by the said recognizance still remaining of record of the said court, &c. fully appears;" which raised a difficulty in that part of the argument; and therefore proposed to the plaintiff's counsel to amend the replication.

Scott then prayed leave to amend without payment of costs: suggesting that this was a sham plea filed by the defendant. And

The Court, after some consultation, said, that for the sake of justice which was much abused by the practice of sham pleading, and by way of precedent in future in order to discountenance the attempt, they would grant a rule calling on the defendant to shew cause why the plaintiff should not have leave to amend without payment of costs; which rule should be made absolute, unless an affidavit was made of the truth of the facts pleaded. But it being admitted on the part of the defendant, to save expence, that it was a sham plea, the Court gave the plaintiff in the first instance,

A Rule absolute to amend without Payment of Costs(a).

The King v. The Inhabitants of Nuneham Courtney.

1 East, 373. April, 29, 1801.

An ex-parte examination in writing of a pauper, taken on oath before two magistrates, for the purpose of removing him to the place of his settlement, is not admissible in evidence upon an appeal against an order of removal on the ground of the pauper's having absconded between the notice of appeal and the trial of it before the Quarter Sessions; although the respondent had used due diligence, but without effect, to procure the attendance of the pauper as a witness, he not having been heard of from the time of his absconding.

TWO justices, by an order made on the 4th of June 1799, removed *Francis Jennings* and *Elizabeth* his wife from *Burcot* to *Nuneham Courtney*, both in the county of *Oxford*. The Sessions on appeal confirmed the order, and stated specially, for the opinion of this Court, that the pauper *F. J.* was about 19 years old, and was married to the said *Elizabeth* in the year 1799, before the date of the said order; and that between the notice of appeal against the order and the then next sessions, the pauper absconded, leaving his wife, and has not since been heard of. And that the officers of *Burcot* have used all due diligence to find him, in order to have him examined as a witness at the hearing of the appeal, but without success. That the pauper was employed in the service of *W. Costar* in *Nuneham Courtney* as a boy to drive his team

(a) Vide *Pierce v. Blake*, Salk. 515, where the Court threatened to fine an attorney for false pleading. [See also *Blewitt v. Marsden*, 10 East 237.]

during the period of 11 months, between *Michaelmas* 1794 and *Michaelmas* 1796: and in order to prove that the pauper was legally settled in *Nuneham Courtney*, the respondent parish of *Burcot* offered in evidence an examination in writing of the pauper, which examination was first taken upon the oath of the pauper on the 4th of *June* 1799, by one magistrate, upon the complaint of the churchwardens and overseers of the poor of *Burcot*, and which examination was on the day of the date of the said order read over to the pauper by the same and another magistrate, before whom the pauper was then taken by the churchwardens and overseers of *Burcot*, in order to be removed to the place of his settlement; and to the truth of the contents of which examination the pauper then made oath before the justices, who thereupon made the said order. But it appeared, that no person belonging to *Nuneham Courtney* was present at either of the beforementioned times; whereupon the appellants objected to the admissibility of this examination in evidence. But the court of quarter sessions over-ruled the objection, and received the examination in evidence; by which it appeared that the pauper, after stating the place of his birth, which was in *Sanford*, deposed, that he hired himself at *Abingdon* fair some days before *Michaelmas* 1794, as a servant to the said *William Costar*, farmer in *Nuneham Courtney*, for a year, to lodge in his house, and to be paid 3s. and 6d. per week for the first half of that year, and 4s. per week for the second part, and to be found in victuals for five weeks in the harvest; and that he served that year and received his wages accordingly. He then stated several other hirings and services to persons in other parishes, none of which was for a year, and concluded by saying he had done no other act to gain a settlement. And the Court thinking this examination to be sufficient proof of the pauper's settlement in *Nuneham Courtney*, did for that reason confirm the order.

This case first came on to be argued in last term, when the Court without hesitation expressed a decided opinion against the admissibility of the evidence. But it stood over by desire of the respondent's counsel. And now

Erskine for the respondents, in answer to a question put to him by the Court, admitted that he had no argument to adduce by which he could expect to alter the opinion which the Court had before intimated.

Per Curiam,

Both Orders quashed(a)(1).

The Attorney-General and *Abbott* were to have argued for the appellants.

Eland v. Karr and Others.

1 East, 375. May 1, 1801.

In *assumpsit* for goods sold and delivered, defendant pleaded a set-off of more money due to him from the plaintiff. Replication, that the goods were agreed to be paid for in ready money: which replication was holden bad on demurrer, being no answer to the plea.

IN *assumpsit*, the plaintiff declared, that the defendants on the 31st of *March* 1800. were indebted to him in 500*l.* for goods before that time sold and delivered to them, for which they promised to pay on request; also upon a *quantum meruit*, and on the common money counts; and then alleged a request, and a breach. Pleas, *non assumpsit* as to all but 51*l.*, and as to that a tender; 2dly, a set-off upon various bills of exchange, (the latest of which became due the 14th of *March*, 1800,) and also for money had and received. Replication to the plea of set-off, as to the promises laid in the first and se-

(a) In the case of *The King v. The Inhabitants of Eriswell*, 3 Term Rep. 707, where the Court were equally divided upon the admissibility in evidence of such an *ex parte* examination, the affirmative opinion was grounded on a presumption that the pauper was dead, or, what was admitted to be equivalent, was insane.

(1) Vide *The King v. Ferry Frystone*, 2 East, 54. *The King v. Abergwilly*, 2 East 68. *The King v. Eriith*, 8 East 539.

cond counts, that at the time of the sale of the said goods, viz. on the 22d of *March* 1800, it was agreed between the plaintiff and defendants, that the defendants should pay to the plaintiff for the said goods *in ready money*, and this they are ready to verify, &c. And as to the rest, the plaintiff admits the tender, and takes the money out of court. General demurrer to the replication to the two first counts, and joinder.

J. B. Warren in support of the demurrer. The replication either states a contract materially different from that in the declaration, in which case it is a departure; or else it states one substantially the same: in either case it is no answer to the plea of set-off. An agreement to pay for goods in ready money admits of a set-off in the same manner as any other debt. The agreement to pay for the goods on delivery is merely to ascertain the time of payment.

The Court then asked the counsel for the plaintiff what possible objection could be made to the plea?

Marryat, contra, said, that he meant to contend that a party who contracts to pay for goods in ready money could not substitute any other mode of payment; and that this was an attempt to substitute the set-off of another debt in lieu of money; and that too in a case where the damages were unliquidated. That there was a known difference between a ready-money price and a price upon credit; and here the defendant obtained the goods at the lesser or ready-money price, and now attempts to avail himself of a mode of payment adapted to a credit price. But

The Court decided, that as at the time of the commencement of the plaintiff's action, which was the time to be regarded, there was a debt due from the plaintiff to the defendant, the latter was entitled under the statute 2 Geo. 2. (a) to set it off. That no objection arose from the damages being unliquidated, for that was the case in all actions of *assumpsit*, when damages are claimed for a breach of contract in non-payment of money. That the form of the plea was an order to set off and allow out of the debt due to the defendant so much as the damages sustained by the plaintiff amounted to by the defendant's not performing his promises; and in estimating the plaintiff's damages in this case, the jury would take into their consideration the loss he had sustained by non-payment of the *ready money*.

Judgment for the Defendant.

Wright v. Rattray.

1 East, 877. May 1, 1801.

A claim of a prescriptive right of way from *A.* over the defendant's close unto *D.* is not supported by proof that a close called *C.*, over which the way once led, and which adjoins to *D.* was formerly possessed by the owner of close *A.*, and was by him conveyed in fee to another, without reserving the right of way; for thereby it appears that the prescriptive right of way does not, as claimed, extend unto *D.* but stops short at *C.*—*Qu.* if the claim had been for a prescriptive right of way over the defendant's close towards *D.*

THIS was an action upon the case for obstructing the plaintiff in his use of a way. The declaration stated, that one *W. Preesh* was seised in his demesne as of fee of a certain piece of land with the appurtenances, situate in the hamlet of *Coundon*, in that part of the parish of *Holy Trinity* which lies in the county of *Warwick*; and that he and all those whose estate he hath in the said piece of land, &c. from time immemorial have had and used, and been accustomed to have and use, and of right ought to have had and used, &c. for themselves and their tenants occupiers of the said piece of land, a

certain way from the said piece of land into, through, and over a certain other piece of land of the defendant, situate in the said hamlet, &c. unto the village of *Allesley* in the said county, and so from thence back again through and over the said piece of land of the defendant unto the said first-mentioned piece of land to pass and repass with carriages, &c. at all times, &c. That *Preesh* demised the said first-mentioned piece of land to the plaintiff to hold, &c. by virtue whereof he entered and was possessed; and the defendant wrongfully obstructed the said way, &c. Plea, the general issue. The cause came on to be tried before *Chambre*, B. at the last Spring Assizes for the county of *Warwick*, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

In *December* 1783, *Preesh* became seised in fee of *Wheeler's Close*, (being the plaintiff's land mentioned to be situate in the hamlet of *Coundon*, &c.) and also of another piece of land called *Pool Meadow*, situate in *Allesley* aforesaid. *Preesh* being so seised, in *February* 1786, by indentures of lease and release granted and conveyed *Pool Meadow* to one *T. Bree* of *Allesley* aforesaid in fee, without reserving any way whatever over the said piece of land, by virtue whereof *Bree* became and still is seized thereof as aforesaid. In *December* 1786, *Preesh* demised *Wheeler's Close* to the plaintiff for 21 years, by virtue whereof the plaintiff entered, and is now in possession. The way claimed by the plaintiff was from *Wheeler's Close* over a piece of land belonging to the defendant called *Lower Benton's Close*, from thence over another piece of land belonging also to the defendant called *Barn Meadow*, from thence over the piece of land belonging to *Bree* called *Pool Meadow*, and from thence into *Allesley* aforesaid, and so from thence back again. The way claimed is not a way of necessity, the plaintiff having other ways as well to *Allesley*, (which are more circuitous and not so convenient) as to *Coventry*, (which is the other part of the parish of *Holy Trinity*); and the plaintiff had no licence from *Bree* to pass or re-pass over his close called *Pool Meadow*. The plaintiff proved an obstruction by the defendant erecting a gate across the way in his own close. It was objected on the part of the defendant, that whatever might be the effect of the evidence to prove an immemorial right anterior to *Preesh's* seisin of the plaintiff's close and *Pool Meadow*, and his conveyance of the latter close; yet that the plaintiff had not supported his declaration, for that by such seisin as aforesaid, and the conveyance of *Pool Meadow* in fee in 1786, without reserving the way, the right of way over the defendant's close was extinguished, or at least suspended, and that the locking up of the gate, as alleged in the declaration, was no injury to the plaintiff. It was therefore agreed to reserve the question of law for the opinion of the Court; and the cause was left to the jury upon the evidence of usage, who found for the plaintiff, subject to the opinion of this Court, whether under the circumstances the plaintiff was entitled to recover.

Reader for the plaintiff. The question is, whether the conveyance of *Pool Meadow* to *Bree* by the owner of *Wheeler's Close* without reserving the right of way, extinguished the right of way over the defendant's close. None of the cases of extinguishment of rights of way by unity of possession apply to the present; they were all cases where there was a unity of possession of the close over which the easement was claimed with the close in respect of which it was claimed: but this is an attempt by the defendant to extinguish the right of way over his own close, by shewing an extinction of it over another intermediate close; that however cannot destroy the prescription over the defendant's close, although it may lay the plaintiff under difficulties with respect to other persons in the enjoyment of the whole extension of such way. [*Grose*, J. observed, that this was claimed in the declaration as one entire prescriptive right of way from one of the *termini* to the other; and as the conveyance of part of the land over which the way led by the owner of the close in respect of which it was claimed, without reserving the way, extin-

guished the prescription at least as to that part, it consequently extinguished the prescriptive right as claimed in the declaration.] That might have been so, if the whole way over each close between the *termini* had been stated in the declaration; but that is not so, nor was it necessary so to state it, according to *Rouse v. Bardin*, 1 H. Blac. 351: it is enough to shew that the party had a prescriptive right of way over the defendant's close in going from one of the *termini* to the other: for the prescription so generally claimed shall only be taken to apply to the defendant's land. Thus in *Sloman v. West*, Palm. 387, 2 Roll. R. 397, *Dodderidge*, J. puts this case; "if a man have a "right of way from his house to the church, and the close next to his house "over which the way leads is his own, he cannot prescribe that he has a right "of way from his house to the church, because he cannot prescribe for a right "of way over his own land:" But *Ley*, C. J. and *Chamberlaine*, J. contra, for then all ways over common fields would be destroyed; and they said, that a general prescription applied only to the lands of others. *Dodderidge*, J. observed, that it might be otherwise where the way was indefinite. Again, in *Jackson v. Shillito*, Tr. 32 G. 3: C. B. to trespass *qu. cl. fr.* the defendant in his plea prescribed for an occupation way from his own close "unto, "through and over" the said several closes in which, &c. "to and unto a certain highway," &c. and from thence back again unto the said close of the defendant. At the trial before Lord *Kenyon* at York Summer Assises 1792, it appeared that one out of several intervening closes was in the possession of the defendant himself; which his lordship thought negatived the prescriptive right claimed, and the plaintiff recovered a verdict: but on application to the Court of C. B. a new trial was granted, on which the defendant afterwards obtained a verdict.

Geast, contra, was stopped by the Court.

LORD KENYON, C. J. The difficulty which the plaintiff lies under here is, that he has stated a prescriptive right of way from his own close over the defendant's land unto the village of *Allesley*, which is disproved by the conveyance of *Pool Meadow* from the owner of *Wheeler's Close*, without reserving a right of way, which therefore operated as an extinguishment, or at least as a suspension of the right as claimed. The plaintiff may perhaps still have a prescriptive right of way over the defendant's close towards, but certainly not unto *Allesley*. I have been considering whether if the right had been so stated it might not have been supported. For any easement may be claimed by prescription in the same manner as it might have been holden by grant. Now if there were several closes belonging to different owners lying between the two *termini*, a grant of a right of way over each might have been obtained from the several owners at different times. But the manner in which the prescription is here pleaded precludes any assistance from that consideration, supposing it to be well founded. And in this respect the case differs very materially from that of *Jackson v. Shillito*, for there the defendant had in fact a right to go the whole line of way from the one *terminus* to the other; whereas here the plaintiff has no such right, for his prescriptive way stops short of *Allesley* unto which it is claimed in the declaration. This is also much strengthened by the opinion of Mr. Justice *Dodderidge* in the case referred to, who is a host in himself; and the two other judges who differed from him do not seem to have given a sufficient answer to what he said.

GROSE, J. assented for the reason he had before given.

LAWRENCE, J. The plaintiff claims a prescriptive right of way from his close over the defendant's unto *Allesley*. Now that is not proved by shewing a prescriptive right of way over the defendant's or any other intermediate close, which stops short of the place to which the claim stated extends.

LE BLANC, J. In the case of *Jackson v. Shillito* the defendant had a right to proceed to the *terminus ad quem* over the way claimed. But here

the plaintiff had no right of way further than *Pool Meadow*, which adjoins the *terminus ad quem*.

Postea to the Defendant.

1 East, 383. May 12, 1801.

Hamilton v. Wilson and Others.

After a party arrested on civil process has been discharged on giving a bail-bond to the sheriff for his appearance at the return of the writ, it is optional in the sheriff whether he will accept the surrender of the party in discharge of the bail-bond before the return of the writ : and therefore, though notice of such surrender were given to the sheriff and the gaoler in whose custody the party then was at the suit of another ; after which the gaoler let the party out of custody ; yet held, that the gaoler was not liable upon his bond of indemnity to the sheriff as for an escape in the former suit ; for the party was not legally in the custody of the sheriff or his gaoler merely by virtue of such notice of surrender.

THIS was an action brought by the plaintiff as sheriff of *Cumberland*, on a bond of indemnity in the penal sum of 3500*l.* given to him by the defendant *Wilson*, as gaoler of the county gaol, and by the other two defendants as his sureties. The plea cravedoyer of the bond, (which was in the usual form,) and of the condition, which recited, that whereas the plaintiff was appointed sheriff of *Cumberland*, and had appointed the defendant *Wilson* to be gaoler of the county gaol, and of all such prisoners as were then in the gaol, or should be delivered to the plaintiff, by the late sheriff, or should or might be arrested, attached, or imprisoned in the said gaol by virtue of any manner of writ, warrant, or other process or authority whatsoever directed or made to the plaintiff, or his under-sheriff or bailiffs, &c. appointed for that purpose, &c. to hold and exercise the said office of keeper of the said gaol, &c. during the shrievalty of the plaintiff, &c. ; and then stated the condition to be, that if the defendant, his deputies, &c. should, during the continuance of the plaintiff as sheriff, &c. receive and safely keep in custody according to the tenor, purport, and effect of the writs, warrants, precepts, commandments or authorities, by virtue of which any prisoner may or shall be or stand committed, charged, or imprisoned in the said gaol, or in the custody of the defendant as gaoler, &c. or of the plaintiff as sheriff, &c. as well all prisoners then in the said gaol, &c. as also every prisoner who should be committed, sent, or delivered to the defendant, &c. upon or by virtue of any writ, warrant, precept, process, commandment, or authority whatsoever of, by, or from the plaintiff or his under-sheriff, deputies, &c., or from or by any justice of the peace, &c., or by any other person having lawful authority so to do, until all and every of the said prisoners should be delivered by due course of law, or set free with the allowance in writing of the plaintiff or his under-sheriff, or delivered over to the next sheriff, &c. ; and also if the defendant, his deputies, &c. should not nor did discharge out of custody any prisoner which was or should be taken, committed, delivered, or left in the said gaol, in the custody of him the defendant, his deputies, &c., unless by due course of law, without the special warrant in writing under the hand and seal of the plaintiff or his under-sheriff, or the liberate in writing of all the plaintiffs or other proper parties at whose suit such prisoner should be detained, &c. first had and obtained for that purpose ; and also if the said gaoler, &c. should undertake the charge of such gaol, and be chargeable with the prisoners therein, and for all escapes of prisoners out of the said gaol, or from or out of the custody of the gaoler, &c., and with all things belonging to the charge and duty of a gaoler, &c. ; and also if the defendants should indemnify and save harmless the plaintiff and his under-sheriff, &c. from every other person touching and concerning the premises, and from all manner of escapes of all manner of prisoners after they should be legally committed and delivered into the custody of the defend-

ant, or into the said gaol, or left under the care, custody, or charge of any of his deputies, &c., or out of the custody of the plaintiff as sheriff, &c.; and of, from, and against all actions, &c. judgments, expences, losses, and incumbrances whatsoever imposed or levied upon or against the plaintiff, &c. by reason of any escape, or letting any prisoner voluntarily, or negligently, or otherwise go at large, &c. by reason of any act, default, neglect, misfeasance, commission, or omission, &c. or from or by reason of any matter, cause, or thing that should or might be done by the defendant as gaoler, &c., then the obligation to be void, otherwise, &c. The plea then averred performance. The replication stated, that on the 12th of June 39 Geo. 3. one *Richardson* was indebted to *Taylor* and *E. Dixon* in 38*l.*, and continued so indebted until the payment of that sum by the plaintiff as aftermentioned; that *Taylor* and *Dixon*, for the recovery of the said debt, on the same day and year, sued out a *latitat* against *Richardson*, directed to the sheriff of *Cumberland*, returnable *Wednesday* next after the *Morrow of All Souls*, indorsed for bail 38*l.*, and delivered the same to the plaintiff, being sheriff, &c., who thereupon arrested *Richardson*: That *Richardson* with his bail, *Dodd* and *Fetherston*, then gave a bail-bond to the sheriff, conditioned for the appearance of *Richardson* at the return of the writ, and was thereupon discharged on such bail. That afterwards the plaintiff, before the return of the same writ, again arrested *Richardson* by virtue of another writ, and carried him to gaol, and there delivered and committed him to the defendant *Wilson* as gaoler, whereby *Richardson* became and was in the lawful custody of the plaintiff as sheriff, and of the defendant *Wilson* as gaoler. That *Richardson* so being in such custody, and *Dodd* and *Fetherston* so being his bail, they afterwards and before the return of the first-mentioned writ, for the purpose of rendering *Richardson* to the custody of the plaintiff as sheriff, in discharge of his said bail, and of satisfying the said bail-bond, made a notice in writing, and directed the same to the plaintiff as sheriff, and to his under-sheriff, and delivered the same to the plaintiff being sheriff, &c. and to the defendant *Wilson* being such gaoler, and thereby required the plaintiff to take notice, that *Richardson* being then a prisoner in the plaintiff's custody, was thereby rendered, and did render himself in discharge of his said bail in the said action, wherein *Taylor* and *Dixon* were plaintiffs and *Richardson* was defendant; and the present plaintiff was thereby required to detain and consider *Richardson* in custody in the said action accordingly, and to deliver up to be cancelled the bail-bond so given as aforesaid; whereby *Richardson*, so being in the custody of the plaintiff and of the defendant as gaoler aforesaid, became and was rendered in the same action to the custody of the present plaintiff as sheriff, and of the defendant *Wilson* as gaoler, in discharge of his bail; and his bail were thereby discharged, and the bail-bond satisfied: and thereupon it became the duty of the defendant *Wilson*, as gaoler, to detain *Richardson* in his custody according to the exigency of the first-mentioned writ, whereof he had notice; but that he afterwards, without the knowledge or consent of *Taylor* and *Dixon* the plaintiffs in that action, or of the present plaintiff, and without any warrant, authority, or allowance whatsoever, voluntarily permitted *Richardson* to escape, the debt due from him to *Taylor* and *Dixon* being then unsatisfied. That *Richardson* did not appear in court according to the exigency of the first writ, and that such proceedings were afterwards had in the same court, &c. that the plaintiff, by reason of the defendant *Wilson's* breach of duty as gaoler, was obliged to pay, and did pay to *Taylor* and *Dixon* their debt of 38*l.*, and also 20*l.* for their costs, &c. To this there was a general demurrer and joinder.

Gibbs in support of the demurrer. The defendant only became bound for the safe keeping of such prisoners as should be in his custody by the authority of the sheriff: but that was not the situation of *Richardson* under the circumstances stated in the replication. The only way in which a gaoler is

bound to take notice of any person being committed to his custody by the authority of the sheriff, under civil process, is by the sheriff's warrant to him for that purpose. After the sheriff has arrested a party by virtue of the writ delivered to him, he makes out his warrant to the gaoler to receive and keep him in his custody, which is the only notice the gaoler has of such arrest. Now here the defendant had no such notice of the arrest of *Richardson* under the first writ; for before his commitment to gaol the sheriff himself discharged him upon a bail-bond, whereby the bail undertook for his appearance at the return of the writ. From that time *Richardson* ceased to be in the custody of the sheriff. And though it has been holden, that if a party out upon a bail-bond surrender himself to the sheriff before the return of the writ, the sheriff may accept his body and cancel the bail-bond^(a), yet certainly it is at his option to accept or refuse such surrender; for otherwise a sheriff would be in a perilous condition, if every person discharged on a bail-bond may surrender himself in discharge of his bail whenever he pleases. The sheriff does not carry his prison about with him, and may not be prepared to accept the party at the time. Besides, the condition of the bail-bond is, that the bail should render the defendant at the return of the writ, which is done in this court; and according to the case of *Harrison v. Davies*, 5 Burr. 2683, they cannot discharge their obligation to the sheriff by a render of the body, or in any other manner than by putting in good bail above. The sheriff therefore, though liable to the plaintiff in the action for the appearance of the defendant at the proper time and place, may, as between himself and the bail below, insist upon the condition of the bail-bond, and is not obliged to incur the risk, expense, and trouble of re-taking and keeping the defendant in the action. The case cited shews, however, that when a party is discharged out of custody on a bail-bond, he is not considered as virtually continuing in the sheriff's custody. Nothing then appears to shew, that at the time when the defendant discharged *Richardson* out of his custody in the second action, he had any notice that *Richardson* was in the sheriff's custody under any other process; nor was he in such custody, unless the sheriff had consented to receive him again. Therefore, the defendant having no authority to detain the party, is not liable in this action as for an escape.

Holroyd, contra. The defendant undertook not to discharge out of custody any prisoner "without the special warrant in writing under the hand and seal of the sheriff or his under-sheriff, or the liberate in writing of all the plaintiffs at whose suit such prisoner should be detained;" notwithstanding which he set *Richardson* at liberty, who was in his custody, without any such authority; which is all that is necessary to shew in order to entitle the plaintiff to recover upon the bond. It is not denied that the sheriff might receive the surrender of *Richardson* in discharge of his bail before the return of the writ, and nothing being stated here to shew his dissent to the notice served on him for that purpose, it must be taken that he assented, if that be necessary. From that time *R.* was legally in the custody of the sheriff at the suit of the plaintiff in the first writ, and the defendant as gaoler might legally detain him, and it was his duty so to do, and his not having so done subjects the sheriff to a responsibility which he would not otherwise have incurred; for at all events he is liable to the plaintiff in that action. And even if the bail-bond continued in force notwithstanding the surrender, the sheriff will be put to the trouble and risk of pursuing his remedy against the bail; but if the bail-bond be discharged, he will be left without remedy by the act of the gaoler. What was said in *Harrison v. Davies*, 5 Burr. 2683, that nothing is a discharge of the bail-bond to the sheriff but putting in bail above, has been much shaken by *Jones v. Lander*, 6 Term Rep. 753, and the other cases before alluded to, and was so considered to be in a subsequent case of *Maddocks v. Bullock*, 1 Bos.

(a) Vide *Jones v. Lander*, 6 Term Rep. 758. *Stamper v. Milbourn*, 7 Term Rep. 122. and *Hyde v. Whiscard*, 8 Term Rep. 456.

& Pull. 325, where the Court held, that the surrender of the defendant before the return of the writ was a performance of the condition of the bail-bond; and therefore, though the plaintiff had taken an assignment of the bail-bond after a surrender, but before the return of the writ, the Court stayed the proceedings against the bail: but as it was taken without notice of such surrender, the plaintiff had the costs of the proceeding up to that time. It seems, therefore, as if it had been there considered as compulsory on the sheriff to receive the surrender of the defendant before the return of the writ in discharge of the bail-bond. At any rate however, if the sheriff have an option in such a matter, the defendant had no right to decide for him: but at the time of *Richardson's* discharge in the second action was bound to apply to the sheriff to know if there were any other detainers against him. And here it is alleged, that after notice of the render to the sheriff, (which notice also appears to have been given to the defendant,) *it became the duty of the defendant to detain Richardson in his custody, according to the exigency of the first writ, whereof the defendant had notice*: and this is admitted by the demurrer. It is not, therefore, competent to the defendant to argue, that he was without notice of the prior proceedings, or that *Richardson* was not detained in custody by the sheriff's authority in the first action.

Lord KENYON, C. J. After a defendant has been discharged out of custody upon a bail-bond, it is neither in the power of the bail to render him, nor of the party to surrender himself again into the custody of the sheriff before the return of the writ, without the consent of the latter. Bail above are indeed said to be the legal gaolers of the defendant, and may take and render him at any time: but this is not the case with respect to bail to the sheriff: their undertaking is, that the party shall appear at the return of the writ; which according to the case of *Harrison v. Davies* can only be satisfied by their putting in good bail above. That case I consider as having decided the point, which has never since been controverted. For the case of *Jones v. Lander*, and the others which followed it, only went the length of giving an option to the sheriff, if he pleased, to accept the surrender of the party, who was willing to return into his custody before the return of the writ: but the sheriff may refuse so to do, and may rest upon the security of the bail-bond, and insist upon the bail performing the condition of it. Now here it is not stated that the sheriff did assent to the surrender of the party, without which the latter was not in his custody under the first writ; and consequently, the gaoler cannot now be liable upon his bond of indemnity to the sheriff, for having permitted the prisoner to go at large, having no authority to detain him in custody at the time(1)(2).

Holroyd then asked leave to amend, which, (it being after argument upon the demurrer,) was denied. And

Per Curiam,

Judgment for the Defendant.

Legh v. Lewis.

1 East, 391. May 5, 1801.

A bond given by a school-master of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron.

DEBT on bond for the penalty of 400*l*. The plea craved oyer of the bond and the condition, which latter was as follows: Whereas the ancient public school within the township of *Nether Kuntford* in the county of *Chester* is

(1) As to the time within which the assent of the sheriff to the surrender may be given, see *Plimpton v. Howell*, 10 East 100.

(2) [See *Watson on Sheriffs*, pp. 114, 115, and cases cited.—W.]

lately become vacant by the death of *J. F.* the late schoolmaster thereof, and whereas it belongeth to the plaintiff to appoint a schoolmaster thereto, and whereas the plaintiff hath this day appointed the defendant unto the said school; and whereas previous to the executing the said appointment the defendant agreed absolutely to resign the said school, &c. and all his interest therein unto the plaintiff, his heirs, &c. when he the defendant shall be required by the plaintiff, his heirs, &c. by writing under his or their hand so to do: now the condition of the above-written obligation is such, that in case the defendant shall, at the request of the plaintiff, his heirs, &c., such request being made under his or their hands, absolutely resign unto the plaintiff, his heirs, &c. when he the defendant shall be required by the said plaintiff, his heirs, &c. so to do, as well the said school, &c. as also all his the defendant's estate, &c. in the same, then the above-written obligation to be void, otherwise to remain, &c. The defendant then pleaded *actio non*, &c., because the said office of schoolmaster of the said ancient public school at, &c. is an office of trust and profit, and a freehold office; and that every person thereto appointed hath always hitherto, from the time of such appointment, been, and continued and remained after such appointment seised thereof as of freehold and right for the term of the life of the person so appointed thereto, without any condition whatsoever to resign the said office; and that it was the duty of the plaintiff to have made an appointment to the said office without making any such stipulation or condition as in the said condition of the said writing obligatory is mentioned; and that the defendant heretofore, on, &c. at, &c. was appointed by the plaintiff, to whom it belonged to appoint, &c., to be the schoolmaster of the said ancient public school, &c. and became, and was, and still is seised of the said office as of freehold and of right, for the term of his natural life. And that before the execution of the said writing obligatory, and before the said appointment, it was corruptly and unlawfully agreed between the plaintiff and defendant, and contrary to the duty of the plaintiff in that behalf, that the plaintiff would appoint the defendant to be schoolmaster, &c. in consideration that if the defendant were so appointed he would resign the said school, &c. unto the plaintiff, his heirs, &c. when he the defendant should be required, &c. by writing, &c. And that the defendant, in pursuance of the said unlawful and corrupt agreement, afterwards, to wit, on, &c. at, &c. did seal and deliver the said writing obligatory, &c. with the condition above specified; and so the defendant saith, that the said supposed writing obligatory so made and given by him for the cause aforesaid is void in law; and this he is ready to verify: wherefore, &c. To this there was a demurrer shewing for special causes, that the plea is too vague and general, and does not shew with certainty and precision how or for what reason it was the duty of the plaintiff to have appointed to the said office of school master without making any such stipulation or condition as in the said condition of the bond is contained, nor how or for what reason the said agreement in the condition mentioned was corrupt or unlawful, or contrary to the duty of the plaintiff: and for that it is not expressly alleged in the said plea, that the said school was a public school, or the supposed office of schoolmaster a public office; or that the same school has existed immemorially; or when, and how, and on what terms and conditions, the same was founded; and for that the inference drawn in the said plea, that the said writing obligatory is void in law, is not warranted by the premises: and for that the same plea contains no material or traversable averment but is argumentative, &c. Joinder in demurrer

Giles was to have argued in support of the demurrer: But

Manley, contra, was desired to begin by stating the particular grounds of objection to the condition of the bond. He insisted, that enough was stated in the plea to shew that the office in question was an ancient public office and a freehold: and though it did not expressly appear by what authority the plaintiff exercised his right of appointment to the office, yet it was al-

leged that the persons holding it had always been appointed for life, without any condition of resignation, as had been here imposed upon the defendant. That by the general rule of law persons appointed to freehold offices, which were public trusts, were not removable therefrom except for misconduct, non-user, or incompetency, neither of which were imputed in this case; and therefore, though a bond to resign on either of those accounts might have been good, because made in aid of the law, as in *Bagshaw v. Bossley*, 4 Term Rep. 78, a bond to enforce residence on a living, and against waste; yet a general bond conditioned to resign at the will of the patron was repugnant to the very nature of such an office or trust, and exceeded the power of appointment stated in the plea and admitted by the demurrer to belong to the plaintiff. Such powers have always been construed strictly; and the patron cannot clog his appointment with any new conditions not warranted by the will of the founder. After the plaintiff had appointed the defendant he was *functus officio* during the defendant's life, or until he was lawfully removed; an attempt therefore to reserve any other control over the appointee was in contravention of the law of patronage, and avoided the instrument taken to secure such an illegal purpose. That the practice of taking such bonds, if allowed, would open a door to corruption, and be a cover for the sale of the office by the patron, which was clearly illegal in the case of any public trust. In *Laying v. Paine*, Willes' Rep. 571, 4, it was holden, that a bond given by one of the officers mentioned in the stat. 5 & 6 Ed. 6. c. 16. to surrender his office at the pleasure of the person appointing, was void. It was true, that it was avoided in that case by the particular statute in question as touching the administration of justice: but Lord C. J. *Willes*, in his reasoning on the case, enters into general grounds, which shew the illegality of such conditions as applicable to all offices of trust.

LORD KENYON, C. J. I cannot see anything illegal or wrong in the patron of this school taking a general bond of resignation from the schoolmaster whom he appoints. Many good reasons may occur for taking such a security; it enforces his good behaviour, and may tend to prevent those ill consequences which too frequently happen from the neglect of those whose duty it is to superintend such institutions. What is this but a more easy method of exercising a visitatorial authority? Such an authority must exist somewhere. If the plaintiff's ancestor founded the school, and no particular visitor were appointed, the authority descends to him as heir. Suppose the plaintiff himself had been the founder, what could have prevented him from taking such a bond? If indeed the defendant could have shewn that any corrupt use were intended to be made of such a bond, he would lay the axe to the root: the Attorney-General would *ex officio* interfere, and upon application to the Court of Chancery the appointment would be taken out of the hands of him who so exercised it corruptly. The case of *Laing v. Paine* turned altogether upon the statute of Ed. 6. which applies only to the sale offices of a public nature under the crown, and certainly not to an office of this description. But I never can admit that at common law a general resignation bond of an office is illegal, although the party may have a freehold in the office. In the instance of ecclesiastical livings that is universally the case: every rector has a freehold in his rectory; yet it was never doubted but that resignation bonds for certain purposes, and up to a certain extent, at least, were binding; though they put an end to the freehold. This was fully decided in *Grey v. Hesketh*, Amb. 268. 3 Burn's Ecc. L. 332. S. C. in B. R. by Lord *Hardwicke*; saying at the same time, that if an ill use were attempted to be made of them the Court of Chancery would interfere(a). Here nothing of that sort is attempted to be shewn. Nor indeed does it distinctly appear upon the plea what the nature of this office is, how constituted, or whether the appointment must

(a) As in *Dunston v. Sandys*, 1 Vern. 411.

necessarily be for life without any condition annexed. At present, I see no grounds for deciding that the condition of the bond is necessarily illegal.

GROSE, J. was of the same opinion.

LAWRENCE, J. I own I have considerable doubts upon the question. The plea is rather loosely drawn, and it might have stated with more precision the nature and extent of the foundation and the power of appointment; it does however state, that the office of schoolmaster is an office of trust and profit, and a freehold; that every person appointed thereto has always continued for life without any condition to resign; and that it was the duty of the plaintiff to have appointed to the office without any such stipulation. If then we are to collect from thence that the founder intended that the appointment should be no otherwise than for life, it seems to me very doubtful how far the person who has the power of such appointment can exercise it in a different manner from what the founder intended. It is true, that a bond may be taken to enforce the observance of those duties which by law are required to be performed by the appointment of an office; but then it should be so expressed in the condition. But a general bond like the present, though it may be made use of for good, may also be made use of for bad purposes; at least there is nothing on the face of the instrument to restrain the improper use of it, as there is where it is conditioned for the due performance and execution of the office. And as Lord Ch. J. *Willes* observed in the case referred to, such a general bond of resignation may be used as a mean of selling the office, or to favour the partial views of the patron by compelling the appointee to regulate his conduct, not by the duties of his office, but in subservience to the pleasure of his patron. The same argument was urged in favour of general resignation bonds in the case of livings, namely, that they were the means of enforcing good behaviour: but in the case of *The Bishop of London v. Fytche*(a), Mr. Justice *Buller* observed on the inconclusiveness of that argument, by saying that it might with equal force be argued that it might be made use of for bad purposes: It is true, that a great majority of the judges were of opinion that such general resignation bonds were valid: but they grounded themselves upon a train of positive authorities in support of them, and not upon the reason of the thing: and it must be admitted, that if it were a new question at this day it would be very difficult to say upon principle that such bonds could be legal.

LE BLANC, J. After the determinations which have taken place with respect to general resignation bonds of livings, I cannot say that this bond is not good in point of law. It is true, those determinations were impeached in the case of *The Bishop of London v. Fytche* in the House of Lords; but the decision in that case against the validity of such bonds turned ultimately upon the ground of their being simoniacal and against the statute, and not as being contrary to the general principles of the common law. That does not affect the present action upon such a bond relating to the office of a schoolmaster; and therefore it falls within the principle of the former determinations, that such general resignation bonds are good at law. And after such a current of authorities, I do not feel myself at liberty to canvass the grounds of that opinion.

Judgment for the Plaintiff.

(a) I have been enabled to add a note of this case in *B. R. quod vide post*, p. 487.

Willey v. Cawthorne.

1 East, 398. May 5, 1801.

A memorial under the annuity act of a bond, stating that *A. and B. severally* became bound, is not sufficient in law if the bond be *joint* as well as *several*.

DEBT on bond in the penal sum of 150*l*. Plea, 1st, cravingoyer of the bond, (which was a *joint and several* bond from one *G. H.* and the defendant,) and of the condition of the bond, which (reciting that the plaintiff had agreed with *G. H.* for the purchase of an annuity of 12*l*. payable quarterly to him the plaintiff during the lives of *G. H.* and the defendant, and the survivor of them, for 72*l*. which was then paid to *G. H.*, and that for better securing the annuity *G. H.* and the defendant had agreed to execute a warrant of attorney of the same date as the bond to confess judgment, &c.) was for securing the payment of the said annuity upon certain days therein mentioned. Pleaded, 1st, Non est factum. 2dly, That within twenty-one days after the execution of the supposed writing obligatory, a memorial of the same and of the granting of the annuity was pursuant to the statute inrolled in the Court of Chancery: which memorial was of a bond dated, &c. *under the hands and seals of G. H. and the defendant*, whereby they *severally* stand bound, &c. in 150*l*., reciting that the plaintiff had agreed with *G. H.* for the purchase of an annuity of 12*l*. for 72*l*., which *G. H.* thereby acknowledged to have received, conditioned for payment of the said annuity at the times therein mentioned, and witnessed by *D. B.* and *J. M.*, &c. dated, &c., prout patet, &c.; which said memorial is not a good and sufficient memorial of the said writing obligatory, and of the granting of the said annuity, and the considerations of granting the same, &c.; by reason whereof the said supposed writing obligatory is void in law, &c. 3dly, That before the making of the said writing obligatory, *G. H.* and the defendant, for the better securing of the said annuity, agreed to execute a warrant of attorney to confess judgment, dated, &c. *which said agreement was and is an assurance for the due payment of the said annuity*, &c. and that no memorial of the said last-mentioned assurance was within 20 days of the execution thereof inrolled, &c. according to the form of the statute, &c. There was a general demurrer to the second plea and joinder: and replication to the last plea, that no warrant of attorney was ever executed by *G. H.* and the defendant, or either of them, for the better securing the said annuity; nor was any agreement for the execution of any such warrant of attorney ever in fact made, signed, or reduced into writing, or otherwise than in and by the said recital in the condition of the bond before-mentioned; and that the said recital was introduced in the said condition by mistake in preparing the same. And this, &c. To this there was also demurrer, and joinder.

Several points arose in this case, which were argued at length by *Marryatt* in support of the demurrer, and *Wigley* contra; but the only one upon which the Court gave any opinion was an objection, which went to the action, of a variance between the bond on which the plaintiff declared, which was a *joint and several* bond given to secure an annuity, and the memorial of such bond registered under the annuity act (17 Geo. 3. c. 26.), which was of a *several* bond only.

LORD KENYON, C. J. The objection is decisive. The object of the legislature was to hold the annuitant to a strict description in the memorial of the consideration of the annuity. The nature of the several instruments by which it is secured must be accurately set forth. That has not been done in the present case; for though *each* of the obligees as described in the memorial are bound to the plaintiff, yet the obligation is of a different nature from

that described, namely, *joint* as well as *several*. And the difference between a joint and several bond is in some respects important; in the former case, if one of the obligees die, his executors are discharged from any liability to the obligor, whose only remedy is against the survivor; in the latter case it is otherwise. Therefore the memorial does not truly describe the security as to the extent of it.

LAWRENCE, J. The object of requiring a memorial of the securities was to shew the real situation of the parties, and the nature of the remedies which the grantee had for the payment of the annuity. Now the memorial here is defective, in not shewing in what manner the obligors might be sued: it only shews that they may be sued severally; whereas by the way of the obligation they are liable to be sued *jointly* as well as *severally*.

The other Judges assented.

Judgment for the Defendant(1).

Lee v. Lingard.

1 East, 401. May 6, 1801.

Where a verdict is taken *pro forma* at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury, and the plaintiff is entitled to enter up judgment for the amount, without first applying to the Court for leave so to do.

AT the trial of this cause at the Sittings after last *Trinity* term at *Guild-hall*, a verdict for the plaintiff for 1200*l.* damages, and costs 40*s.* was taken by consent, subject to the award of an arbitrator (it being a question of figures), who was to make his award on or before the second day of *Michaelmas* term then next, and the costs to abide the event. And this was afterwards made a rule of court. On the 25th of *August* last, the arbitrator made his award, whereby he directed the defendant, on the 12th of *November* following, to pay the plaintiff 1071*l.* 16*s.* 1*d.* The defendant not attending as required to settle the demand, the plaintiff proceeded to tax his costs before the Master at 149*l.*, and signed final judgment on that day for the said sum of 1200*l.* for which the verdict was first taken, 40*s.* for costs, and 147*l.* increased costs, making together 1349*l.*; and on the 17th of *November*, executed a writ of *fi. fa.* indorsed to levy 1224*l.* 3*s.*, besides officer's fees, sheriff's poundage, and other expences; which sum of 1224*l.* 3*s.* consisted of the following items; "amount of debt upon the award 1071*l.* 16*s.* 1*d.*; interest thereon from the "12th to the 25th of *November* 1*l.* 18*s.*; costs taxed 149*l.*; *fi. fa.* 16*s.* 6*d.*; "test. *fi. fa.* 11*s.* 6*d.*; warrant and messenger 3*s.* 6*d.*; letters to the under-sheriff, and postage 3*s.* 6*d.*" In addition to these sums, the sheriff returned that he had levied 33*l.* 2*s.* for his poundage. Thereupon the defendant obtained a rule, calling on the plaintiff to shew cause why the writ of *feri facias* executed in this cause should not be set aside with costs, and the money levied and poundage thereon be returned to the defendant.

This rule was principally grounded upon a supposed irregularity in the plaintiff in having, without leave of the Court first obtained, entered up final judgment, and sued out execution for the sum awarded. In support of which it was contended to be the usual practice(a) where a verdict was taken by consent, subject to the future award of an arbitrator, that when the sum really due was ascertained by the award, to move the Court for leave to enter the verdict for so much as the arbitrator had awarded, and afterwards to proceed to final judgment and execution. On the other hand it was insisted, that the

(1) Vide *Horwood v. Underhill*, 10 East, 143.

(a) Vide 1 Salk. 84, and Qto. Barnes, 68, cited in 2 Tidd's Prac. 750, with a *quere*.

plaintiff was at liberty to enter up judgment for the sum awarded without first applying to the Court; more especially when, as in this case, the sum awarded was less than that for which the verdict was entered. This was the principal point contested; but it was also contended on the part of the defendant, that the execution was at all events excessive, inasmuch as the defendant was not chargeable with interest on the sum awarded, nor with the sheriff's poundage, nor with the other fees on the levy.

The Attorney-General in support of the rule.

Erskine and Garrow, contra.

LORD KENYON, C. J. There is no foundation for the additional charge for interest on the sum awarded. Wherever interest is intended to be given, it forms part of the damages assessed by the jury, or by those who are substituted in their place by the parties. Also the items for sheriff's poundage and the other fees of the levy must be struck out of the account; the defendant is not liable for any such charges. With respect to the principal question, I do not find, upon reference to the Master, that there is any such settled practice as that which has been supposed, requiring a plaintiff, for whom a sum has been awarded under such a rule of reference as the present, to apply first for the leave of the Court before he can enter up his judgment for the sum so awarded. Upon principle it appears to me not to be necessary. It is often a matter of convenience, and in furtherance of justice at *nisi prius*, where matters of account between parties are to be investigated, to refer the amount to be settled by an arbitrator, who may have more time and opportunity to make the inquiry and arrive at a proper conclusion than the jury are able to do; a verdict is therefore taken *pro forma*, subject to the award of the arbitrator; but after the arbitrator has ascertained the sum to be recovered, such finding is in the place of the verdict, and must be considered the same as if the jury had originally found so much to be due: and then all the same consequences ensue. The plaintiff is only entitled to enter up his judgment for so much; and the sum for which the verdict was nominally taken cannot be considered as in the nature of a penalty for which the plaintiff is entitled to enter up judgment. If the jury had in the first instance given their verdict for the sum awarded, the plaintiff would have been entitled to enter up his judgment after the four first days of the ensuing term, and then he would have been entitled to sue out execution immediately afterwards. A pause is allowed for those four days to the party against whom the verdict is given, in order to afford him an opportunity of applying to the Court to rectify any mistake which may have been committed. Here the defendant has had the benefit of a longer delay, for final judgment was not entered till the 14th of November. The award was in the place of the verdict of the jury; and as there is no rule of practice obliging the party to apply to the Court for leave to enter up judgment for the sum awarded, I see no reason for making such a rule now(1). Therefore, subject to the deductions which have been mentioned, let the execution stand: but inasmuch as there has been an excess in levying more than the defendant was bound to pay, and to remedy which he was compelled to apply to the Court, I think he is entitled to be allowed the costs of this application.

Per Curiam,

Deducting the charge of interest, and the sheriff's poundage, and the costs of the levy, to be returned to the defendant; and on payment of the costs of this application by the plaintiff to the defendant; the remainder of the money levied to be paid over by the sheriff to the plaintiff.

(1) Vide *Higginson v. Nisbitt*, 1 Bos. & Pull. 97. *Grimes v. Nisbitt*, 1 Bos. & Pull. 480. *Borrowdale v. Hitchens*, 3 Bos. & Pull. 244. overruling *Hall v. Allister*, 1 Salk. 84, and *Reed v. Garnet*, Barnes, 58. But it is necessary to obtain the usual rule for signing judgment. *Hayward v. Ribbens*, 4 East 210.

Pearson v. Rawlings.

1 East, 405. May 6, 1801.

If the plaintiff's attorney sign judgment, and file the committitur piece with the clerk of the judgments within the second term after trial had and verdict obtained against a prisoner, that is a sufficient *charging him in execution within two terms* pursuant to the rule of Court of Hil. 26 Geo. 3, though the final judgment and the committitur be not entered of record by the officer of the Court till the *continuance-day* after such second term; provided such entries be then completed.

A RULE was obtained calling upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the marshal, on the ground of his not having been charged in execution in due time. By a rule of court of Hil. 26 Geo. 3. (a) a prisoner is declared supersedeable, unless the plaintiff shall cause him to be charged in execution *within two terms next after trial had*, or final judgment obtained. Here the trial was had at the last summer assizes for *Wells*, when the plaintiff obtained a verdict; and the defendant ought regularly to have been charged in execution before the expiration of *Hilary* term last, which ended on the 12th of *February*. It appeared that final judgment was signed, and the committitur piece filed with the clerk of the judgments on the 10th of *February*, and that the committitur was also entered in the marshal's book within the term; all which are the acts of the party: but that the entry of the final judgment and of the committitur on the record, which are the acts of the officer of the court were not completed till the 21st of *February*, which was the *continuance day* (as it is called) of *Hilary* term. And the sole question was, Whether such entries by the officer on that day should have relation back to the preceding term, so as to satisfy the requisition of the rule of Court abovementioned?

This matter was several times discussed before the Court, who directed inquiries to be made as to the foundation of the practice of appointing a day after each term, known by the name of the *continuance day*, for the performance of acts, which ought regularly to be done within the term. And it appeared that the *continuance day* is a day fixed by the Master at his discretion after each term, (though generally about the same period after the term,) regulated by the convenience of the officers of the court for the dispatch of business, but principally on behalf of the chief clerk to audit the accounts of the several officers under him. That the practice of appointing such a day had existed at least a century, and is referred to in a rule of court in the time of King *William III.* That it frequently happened, from the number of judgments and committiturs filed within the few last days of the term, that it became impossible for the proper officer to enter them upon the roll within the term, in consequence of which the practice had prevailed of completing the entries by the *continuance day*, as of the preceding term. In confirmation of which practice reference was made to an instance (a note of which was furnished by an officer of the court) which occurred about sixteen years ago upon a similar application made on behalf of a prisoner before Mr. Justice *Buller*; when the clerk of the Treasury (Mr. *Edge*), whose duty it is to enter up the final judgments upon the roll, attended before the judge, and stated that almost all the judgments are brought in within the last two, three, or four days of the term; that it was impossible for him to enter them upon the roll between the hours of shutting the clerk of the judgments' office at 7 o'clock on the last evening of the term, and the opening of the office next morning, even though he and his clerks were to write all night. That in consequence of this representation Mr. Justice *Buller* refused to discharge the prisoner; and

informed Mr. *Edge* that he would take an opportunity before the next term of speaking to the other judges of the court on the subject. Accordingly on the first morning of the following term, Mr. *Edge*, and Mr. *Benton* the then Master, were sent for into the Judges' room, and informed by Mr. Justice *Buller* that he had consulted his brethren, who were all of opinion that it was reasonable that the officers of the court should have sufficient time allowed them to enter up the judgments and committurs; and that in future they might take till the continuance day: under which authority the practice has continued from that time to the present.

Mingay and *Lambe*, in support of the rule, relied on the terms of the rule of court of the 26 Geo. 3, which was an express recognition and continuance in this respect of the former practice of the court, and must have been promulgated posterior to the supposed alteration of the practice introduced upon the authority of Mr. Justice *Buller*; even admitting that a private resolution of the judges of the court would supersede a public rule of court. That in *Unwin v. Kirchoffe*, 2 Stra. 1215. the very point in question was decided so long ago as M. 18 Geo. 2.: for there, upon a motion to supersede the defendant as not being charged in execution within two terms, the Court held, that the committur must be actually entered on the record before the end of the second term; and that there was no extension of the time to the continuance day after term: nor was it sufficient that there was an entry in the marshal's book in time(a). This was again recognized in *Fotterel v. Philby*, 3 Burr. 1841. H. 6. Geo. 3. and in *Woodbridge v. Forth*(b), Tr. 13 Geo. 3., and is laid down as the rule in the latest books of practice(c). That however the strict rule might have been relaxed in other cases, yet a prisoner was entitled to take advantage of any neglect or defect in the proceedings against him.

Erskine and *Burrough*, in shewing cause against the rule, relied upon the alteration of the practice adopted sixteen years ago; and that it was not inconsistent with the rule of court of H. 26 Geo. 3., for the entries when made referred back to the preceding term. That it was sufficient for the plaintiff to do every thing which was in his power within the two terms, which was done in the present case, and he could not be answerable for the acts of the officer of the court over which he had no control, and for which he ought not to suffer. That the practice itself arose out of the necessity of the case, it being impossible for the officer in many instances to complete the entries on the judgment roll within the term. That in the case of *Fotterel v. Philby* there was no entry of the defendant's commitment on the roll, nor any committur piece filed in time to authorize its being so entered on the record: and that was probably the case in *Unwin v. Kirchoffe*, which is very shortly reported in *Strange*; which therefore differs those cases from the present, where the committur piece was properly filed before the end of the term. That at any rate, as the practice had prevailed for so many years by which alone the practisers could regulate their conduct, the Court would not set it aside in the present instance, whatever rule they might make in future.

LORD KENYON, C. J. The only question now is, not upon the existence or validity of the rule of court requiring a prisoner to be charged in execution within the two terms after trial had, &c. but whether according to the received practice of the court for the last sixteen years at least, it is not sufficient for the officer of the court to enter the final judgment and committur on the record by the continuance day after each term, as of that term. It is by no means unusual to make entries of judicial acts *nunc pro tunc* by leave of the Court. This has sometimes been done after subsequent proceedings had, in order to warrant such proceedings, as by issuing a *fiери facias* in order to

(a) *Ib.* and vide *Wrightman v. Mullers*, 2 Stra. 1236.

(b) *Ib.* in *margin*.

(c) Vide 1 *Tidd's Prac.* 229.

warrant a *testatum fieri facias* antecedently issued^(a). Now here it appears that a very ancient practice subsists, recognized by a rule of court in the time of King William, (E. 11 W. 3.) for the secondary^(b) of the court to appoint a continuance day after each term for auditing the accounts of the several officers, and completing other business relative to the term; and it has been considered, that the entries made by the proper officer by that day as of the preceding term are judicially entered of the term. A similar course of proceeding takes place at the assizes; where real actions are brought in the counties palatine, entries are made after the assizes are closed; and there is an ancient fee demandable in such cases called the *post diem* fee: and in this court also there is what is called the *post terminum* fee, payable on the same account. This practice is not impugned by the rule of court in 1786, which is in general terms, leaving it open to the construction put upon it by the practice in this respect.

LAWRENCE, J. The practice has arisen from the necessity of the case. It is often impossible for the officer to finish the entries on the roll within the term. It is therefore enough that the plaintiff does every act required to be done by him within the two terms. But the regularity of his proceeding can never depend upon the quantity of business which the officer has to do before the end of the term, or his expedition in completing it.

Per Curiam,

Rule discharged.

On the last day of the term, Lord Kenyon delivered the following rule to the Master, which was read by him in court.

REGULA GENERALIS.

E. 41 Geo. 3.

Filing and entry of committitur against prisoners.

IT IS ORDERED, That from and after the first day of *Trinity* term next, every committitur on every judgment obtained, or to be obtained, in this Court, against any prisoner or prisoners, shall be filed with the Clerk of the Docquets of this Court on or before the last day of the term in which such prisoner or prisoners is or are to be charged in execution. And the said Clerk of the Docquets shall enter such committitur on the judgment roll within four days next after the end of such term, exclusive of the last day of the term; unless the last of such four days be *Sunday*, and in that case within five days next after the end of such term: and that in default thereof, such prisoner or prisoners shall be entitled to be discharged.

Cuming v. Sharland, one, &c.

1 East, 411. May 6, 1801.

Where a defendant under an order to plead issuably puts in a sham demurrer to some of the counts in the declaration and pleads issuably as to the rest, the plaintiff may consider the whole as a nullity, and sign judgment as for want of a plea.

A RULE was obtained, calling upon the plaintiff to shew cause why the interlocutory judgment signed in this cause, and the writ of inquiry executed thereon, should not be set aside for irregularity, with costs, &c. It appeared, that the bill was filed in last *Hilary* term, and the defendant obtained further time to plead by a judge's order till the 27th of *February*, upon the terms of pleading issuably, rejoining gratis, and taking short notice of trial for the then

(a) Vide several instances of a similar kind collected in Tidd's Prac. 840-1.

(b) Usually called the Master; though the other is the proper official appellation.

next assizes at *Exeter*. The declaration, which was in *assumpsit*, consisted of four counts upon special agreements, and four other general money counts : and on the said 27th of *February*, the defendant filed special demurrers (alleging sham causes of demurrer) to the four first counts, and pleaded *non assumpsit* and the bankruptcy of the defendant to the four last counts. It was objected to the defendant's agent at the time, that the special demurrers, not affecting the merits of the case, were not issuable pleas within the meaning of the judge's order ; and it was proposed to him to strike them out and put in issuable pleas, so that the cause might proceed to trial at the ensuing assizes. This however being denied, and the regularity of the pleading insisted upon, the plaintiff on the 2d of *March* signed judgment in the cause generally upon the whole declaration, as for want of a plea, and gave notice of executing a writ of inquiry on the 16th of *March*, being the commission day of the assizes at *Exeter*. After which the plaintiff again offered to waive the judgment and proceed to trial on the merits, if the defendant would withdraw his special demurrer, but without effect. The plaintiff then proceeded to execute his writ of inquiry, and recovered damages 1914*l.* 13*s.* 5*d.* on the four first counts, and 495*l.* 11*s.* 9*d.* on the remaining counts.

Gibbs and *Burrough* shewed cause against the rule, and contended, that where a defendant who prayed for an indulgence, in having further time to plead than by the general rule he was entitled to, obtained it upon the condition of pleading issuably, that condition is entire and goes to the whole declaration ; and therefore if he do not plead issuably as to the whole, it is the same as if he had not pleaded at all within the time allowed, and consequently the plaintiff may sign judgment as for want of a plea, although the defendant may have pleaded issuably to some of the counts. For otherwise, if the condition were split and made several as to each count, the whole object of it, which is to prevent delay, would be defeated. Now though a demurrer, which goes to the substance of the declaration, be an issuable plea within the rule, yet a sham demurrer like the present is in fraud of the leave of the court and a mere nullity. And they cited *Sutton v. Waddilove*, Qto. Barnes, 314, as in point.

Dampier, contra, admitted that the demurrers to the four special counts were tantamount to an admission of the plaintiff's cause of action in those counts, and therefore that the plaintiff might have taken judgment upon them ; but contended that he was not authorised to sign judgment generally as for want of a plea, the effect of which is to make the defendant admit the cause of action in the other counts also, in contradiction to his issuable pleas thereto. The proper course to have taken would have been to have gone to trial upon those counts to which issuable pleas were pleaded, and to have taken judgment by *nil dicit* as to the others ; in which case the *venire* issues as well for the purpose of inquiry and of assessing damages on the latter as for trial generally on the former. By this method no detriment or delay can happen to the plaintiff ; but if the practice were otherwise, a defendant might be subjected to great hardship, where the plaintiff comprehended several distinct causes of action in the declaration ; in which case, though he were willing to admit the cause of action in some of the counts, by suffering judgment by default as to those, and thereby saving the expense of a trial, yet according to what is now contended he would be precluded from so doing by his undertaking to plead issuably to the whole declaration. The contrary, however, is well known. The case cited was in replevin, where the defendant having made two avowries, and one of them being unanswered, it was sufficient to entitle him to judgment ; which distinguishes it from the present case.

LORD KENYON, C. J. The interest of the public is never better advanced than when we can inculcate by our rules the advantage of acting honestly. The defendant here seeks to set aside proceedings which have been induced by his own fault. An action was brought against him, and not being prepar-

ed to answer it at the appointed time, he applied for the indulgence of further time to plead, which the Court granted upon the usual terms; which in effect are no more than these, that he should bring forward his real defence, if he had any, at once, and not entangle the plaintiff in the mere forms of pleading. The defendant, after this undertaking, had the option of denying the whole charge, or of letting judgment go by default as to such parts of it as he was ready to admit, and denying the rest. Instead of which, for the sake of perverting justice and creating delay and expence, he only pleaded issuably to some of the counts, and put in sham demurrers, to the others. This is not a fair compliance with the judge's order, but a palpable evasion of it; and therefore I am glad that he has met with his desert; that the plaintiff has signed judgment as for want of a plea, which he had a right to do. The consequence is, that this rule must be discharged with costs.

GROSE, J. The most advantageous construction of the rule for pleading issuably is, that it should go to the whole of the declaration; otherwise the object of it will be defeated.

LAWRENCE, J. There is no objection under the terms of the rule to the defendant's letting judgment go by default as to some of the counts which he is disposed to admit, provided he pleads issuably to those which he means to deny. But he shall not be permitted to evade the rule, by pretending to give a special answer to part which has nothing to do with the merits of the case.

LE BLANC, J. The object of the rule is to expedite justice, and not to entangle it: and therefore a defendant shall not be suffered to take advantage of the indulgence granted to him in the first instance merely to create further delay.

Rule discharged with Costs(a).

Knight v. Keyte.

1 East, 415. May 7, 1801.

An affidavit to hold to bail made by the agent of the plaintiff, expressly negating a tender in bank notes of the debt to his principal as well as to himself, is sufficient, though the plaintiff himself were not therein stated to reside abroad.

THE affidavit to hold to bail in this case was made by the clerk and agent of the plaintiff, (whose usual place of residence was near *Kidderminster* in *Worcestershire*;) and stated in express terms, that the defendant was indebted to the plaintiff in 210*l.* for timber sold by him to the defendant; and that the defendant had made no tender in bank notes(b), &c. to the plaintiff, or to the deponent as his clerk and agent.

Lambe shewed cause against a rule for discharging the defendant on common bail, obtained on the ground of the incapacity of the agent to swear to such a negative, namely, that no tender was made to his principal. He answered, that it was sufficient that the agent had sworn positively to the fact; of which he might well have, and had in this case, ample means of information: for his principal was abroad at the time, and all the business was conducted by himself. The affidavit here is more precise than that in *Munro v. Spinks*, 8 Term Rep. 284, where an agent of the plaintiff residing abroad only negated the tender, according to his belief, which was deemed sufficient.

Espinasse, contra, relied upon *Smith v. Tyson*, 2 Bos. and Pull. 339, where it was holden, that an affidavit made by the plaintiff's clerk expressly negating a tender in bank notes to the plaintiff was bad, because the clerk could

(a) Vide *Waterfall v. Glode*, 3 Term Rep. 305. S. P. But where the defendant was advised that there was substantial ground of demurrer, the Court set aside judgment signed as for want of a plea, on terms. *Berry v. Anderson*, 7 Term Rep. 530.

(b) According to the requesting of the stat. 87 Geo. 3. c. 45.

not have certain knowledge of such a negative fact not relating to himself. And there is no reason here why the plaintiff himself residing in this country, to whom that fact must be best known, should not have joined in the affidavit.

Per Curiam. There is no ground for such an objection. There can be no such rule, as that an agent cannot swear positively to the fact of there having been no tender to his principal. Suppose the latter resided in the *East Indies*, and the business had passed through the agent's hands alone. The Court cannot tell what means the agent may have for satisfying himself of the fact: it is enough for this purpose if he take upon him to swear positively (a) to it.

Rule discharged.

Doe on the several Demises of Foquett and Others v. Worsley, Clerk.

1 East, 416. May 8, 1801.

Cross remainders cannot be implied in a deed; and can only be raised by proper words of limitation; however plainly expressed the intention of the parties may be. Under a limitation in a marriage settlement to the use of all and every the daughter and daughters of, &c. to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters; and for default of such issue to the right heirs, &c. held that there were no cross remainders between the daughters or their issue.

THIS was an ejectment brought for the recovery of three undivided fourth parts of certain messuages and lands in the several parishes of *Arretton*, *Gods-hill*, and *Gatcombe* in the county of *Hants*. The declaration contained counts on four several demises, 1st, of *Lancelot Foquett* deceased, laid on the 2d of *January* 1794; 2d, of *Richard Foquett* the elder, laid on the 2d of *January* 1798; 3d, of *Richard Foquett* the younger, laid on the 1st of *January* 1800; which several demises were each of them for three undivided fourth parts of the premises in question; and 4thly, on the demise of *Richard Foquett* the younger, for one undivided fourth part of the premises, laid on the 1st of *January* 1800. The defendant having appeared as landlord, and pleaded the general issue, the cause was tried before *Thompson*, B. at the last assizes at *Winchester*, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

By indentures of lease and release dated the 22d and 23d of *February* 1699, made between *Lancelot Colman*, *John Read*, and *Hester* his wife, mother of the said *Lancelot Colman*, of the first part; *David Urry* the elder, and *David Urry* the younger, of the second part; and *Mary Urry*, spinster, grandchild of the said *David Urry*, the elder, of the third part; being the settlement made in consideration of the intended marriage between *Lancelot Colman*, and *Mary Urry*, the premises in question were conveyed by the said *Lancelot Colman*, *John Read*, and *Hester* his wife, to *David Urry* the elder and *David Urry* the younger, their heirs and assigns, to hold to them their heirs and assigns, to the use of *Lancelot Colman* and his assigns for 99 years, if he should so long live; remainder to the use of *David Urry* the elder and *David Urry* the younger, and their heirs, during the life of *Lancelot Colman*, in trust to preserve contingent remainders; remainder to the use of *Mary Urry* for her life; remainder to the use of the first and other sons of the body of *Lancelot Colman* on the body of the said *Mary* to be begotten sev-

(a) Where the plaintiff resides in *England* it is not enough for the agent to negative the tender of the debt in Bank notes "to the best of his knowledge and belief." *Cass v. Levy*, 8 Term Rep. 526. [See also *Elliott v. Duggan*, 2 East, 24.]

erally, successively, and respectively one after another, in order and course as they and every of them shall be in seniority of age and priority of birth, and the heirs of the body and bodies of all and every such son and sons lawfully issuing, the elder of such son and sons and the heirs of his body issuing being always preferred to take before the younger of them, and the heirs of his and their body and bodies issuing; and for default of such issue, remainder to the use of all and every the daughter and daughters of the body of *Lancelot Colman* on the body of the said *Mary* lawfully to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and for default of such issue, to the use of the right heirs of *Lancelot Colman* for ever; and to and for no other use, intent, or purpose whatsoever. The marriage took effect, and *Lancelot Colman*, who survived *Mary* his wife, died intestate in 1745, leaving issue by his said wife two sons and four daughters, (viz.) *Urry Colman* (the eldest son), *David Coleman*, *Thomasin* (wife of *John Foquett*), *Hester Colman*, *Mary Colman* and *Ann Colman*, and no other issue. *Urry Colman*, on the death of his father *Lancelot*, entered into possession of the premises as eldest son of the said marriage. *David* his younger brother, and *Hester Colman*, and *Ann Colman*, his sisters, died without issue in his lifetime: and *Urry Colman* having continued in possession of the premises until December 1774, then died without issue; having by his will dated 26th of May 1772, devised the premises to *James Worsley*, the defendant's brother, in fee. *Thomasin Foquett* also died in the lifetime of *Urry Colman* leaving issue two sons, viz. *Lancelot Foquett* her eldest son, and *Richard Foquett*, father of the lessor of the plaintiff, and no other issue. On the death of *Urry Colman* without issue in 1774, *James Worsley* as devisee of *Urry Colman* entered into possession of two undivided fourth parts of the premises, viz. the two fourth parts which *Hester Colman* and *Ann Colman* would have taken had they survived *Urry Colman*; and continued in possession and received and enjoyed the rents and profits of the said two fourths from the death of *Urry Colman* until 1787, when he died; having by his will devised all his real estates to the defendant in fee. And the defendant on the death of *James Worsley* entered upon, and has since continued in possession of the two undivided fourths of the premises, and received and enjoyed the rents and profits thereof; and in Easter term 1793, levied a fine *sur conuzance de droit come ceo*, &c. for the said two undivided fourth parts: the use of which fine was by an indenture dated 6th February 1793 declared to be to himself in fee. On the death of *Urry Colman*, *Mary Colman* entered into possession of one undivided fourth part of the premises, and continued in possession, and received the rents and profits thereof until April 1794, when she died without issue and unmarried; and on her death the defendant, as devisee of his brother, who was devisee of *Urry Colman*, entered into and has since continued in possession of the said undivided fourth part of the premises, and received and enjoyed the rents and profits thereof. On the death of *Urry Colman* as aforesaid, *Lancelot Foquett* entered into possession of one other undivided fourth part of the premises, and continued in possession, and received and enjoyed the rents and profits thereof until 1797, when he died without issue: and on his death *Richard Foquett* the younger, son of *Thomasin Foquett*, and father of the lessor of the plaintiff, entered upon possession of the last mentioned undivided fourth part, and continued in possession thereof until 1798, when he sold and conveyed the same to the defendant in fee by indentures of lease and release and common recovery. *Richard Foquett*, father of the lessor of the plaintiff, died in 1799, leaving the lessor of the plaintiff his only son and heir at law. The lessor of the plaintiff made an actual entry upon the premises on the 26th of December 1800, and was then ousted therefrom by *Thomas Lake*, the tenant in possession to defendant, of the premises in question, except such as are situate in *Gatcombe*. The

question for the opinion of the court was, Whether the plaintiff were entitled to recover the whole or any part of the premises in question, and on which of the counts?

Sturges, for the lessor of the plaintiff, contended, that under the limitation, "to the use of all and every the daughter and daughters of the body of *L. C.*," "on the body of *M.* to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters lawfully issuing; and for default of such issue, to the right heirs of *L. C.*" &c.; the daughters took cross remainders in tail; and consequently, that the lessor of the plaintiff, being the only surviving issue of any of those daughters, was entitled to the whole estate, except the part which had been sold by his father to the defendant. He admitted that cross remainders could not be raised by *implication* in a deed, nor even in a will between more than two, without some words to shew such an intent: but here he contended that cross remainders were *expressly* created by necessary construction of the words of the settlement. In *Doe v. Wainewright*, 5 Term Rep. 427, it was said that no technical precise form of words was necessary to raise cross remainders. That was a case of construction upon a deed, where cross remainders were raised, though not created in the usual terms of conveyancing: and there stress was laid on the limitation over being "in case *all* the children should die without issue;" which word *all*, it was said, could not be satisfied without determining that there should be cross remainders between the children. Now here the relative word *such* ("for default of *such* issue,") is at least tantamount to the word *all*; for it refers to its antecedent, "*all and every* the daughter and daughters." As the ultimate remainder, therefore, could not take effect till failure of the issue of all the daughters, they must take cross remainders by necessary construction of those words, coupled with the prior limitation to the "*heirs* of the body and bodies of all and every of them." The propriety of this construction is much strengthened by the consideration that the question arises upon a marriage settlement, where the primary object is to preserve the estate amongst the children of the marriage, so that no part of it should go over as long as any of them survived. This is so much the general presumption that in all the cases from that in *Dyer*, 303. b. pl. 49 down to *Doe d. Tanner v. Dorrell*, 5 Term. Rep. 518, (upon which the defendant is supposed principally to rely;) such as *Davenport v. Oldis*, 1 Atk. 579, *Comber v. Hill*, 2 Stra. 969, *Williams v. Brown*, 2 Stra. 996, *Pery v. White*, Cowp. 777, and *Phipard v. Mansfield*, Ib. 797, the Court have always distinguished against raising cross remainders where the word *respective*, or some synonymous expression was used in the limitation to the heirs of the bodies of the first takers in common or in joint tenancy. But the case of *Wright v. Holford*, Cowp. 31, is directly in point for construing the words in this settlement to create express cross remainders. There the limitation was, in default of sons, "to the use of *all and every* the daughter and daughters of *P. H.* and *C. H.* to be begotten, and to the *heirs* of *their body and bodies*, as tenants in common, &c. and for default of *such* issue, to the right heir," &c. There it was contended by Mr. *Hargrave* for the defendant, that those words not only furnished a *necessary implication*, but *expressly created* cross remainders between the daughters. That the words, "for default of *such* issue," could not be construed in any other manner than as relative to the issue of *all and every* daughter. And the Court, in the certificate which was afterwards sent to the Chancellor, held, that the daughters must take cross remainders, because the limitation over was of the *whole* estate, "upon the express contingency of failure of all and every the daughter, and daughters, and the heirs of their *body and bodies*; and the limitation over on default of *such* issue, was to the heir at law." It is probable, therefore, that the court adopted the argument of the defendant's counsel; to which no objection was made; while on the other hand, at the beginning

of their certificate, they observe that there are no words intimating an intention to limit over the *respective* shares of the daughters dying without issue : which Lord *Mansfield* afterwards said was introduced in order to answer the cases of *Comber v. Hill*, and *Williams v. Brown*, and to satisfy the doubts of Mr. Serjt. *Hill*, who argued for the plaintiff. It is true, that that was a case of construction upon the words of a will ; but that cannot vary the question ; because, if the Court thought that such words did *expressly* create cross remainders, the same words must necessarily carry the same meaning in a deed, since, as was holden in *Doe v. Wainewright*, no technical form of words is necessary to be used in a deed for that purpose.

East, for the defendant, said, that even if the question had arisen upon the words of a will, it might be doubtful whether cross remainders could be raised by implication in this case ; for it was an established principle recognized in all the books, that as between more than two the general presumption was against such an implication, unless there were any words used from whence the contrary intent was plainly to be inferred. This was admitted by Lord *Mansfield* in *Phipard v. Mansfield*, Ib. 800, and adopted by the court in *Pery v. White*, Ib. 777-80. And in *Müller v. Moore*, 13 Geo. 2. MS. *Buller*, J. which is referred to by Mr. Justice *Buller* in the last-mentioned case as having settled the rule respecting cross remainders by implication ; Lord C. J. *Lee* said, " where the devise is to three or more, cross remainders cannot be holden, unless the intent be plain and unavoidable, and then the Court may be forced to determine in favour of cross remainders." Now here are no such words used from whence cross remainders have been implied in other cases. The words principally relied on are the limitation over being " in default of such issue." But in *Davenport v. Oldys*, 1 Atk. 579, Lord *Hardwicke* said, that no case could be cited where cross remainders had been adjudged to arise merely on those words : and that construction was rejected on words of a similar import in *Doe dem. Cock v. Cooper*, ante, 229. In some of the cases, where cross remainders have been raised by implication on similar limitations, stress has been laid on the devise being of *all* the lands on which the limitation over was to operate, which shewed the testator's intent to be, that the ultimate remainder-man should take the whole together, and not in parts, as each preceding taker died without issue. Such were the cases of *Holmes v. Meynel*, T. Ray. 452, and *Phipard v. Mansfield*, Cowp. 800. In other cases the limitation over was only to take place if *all* the preceding takers died without issue, which shewed a like intent : as in the case cited from *Dyer* 303, b. pl. 49. On a similar ground the case of *Wright v. Holford*, Cowp. 31, so principally relied on by the plaintiff's counsel, might be distinguished from the present, for that was a devise of " *all* the testatrix's undivided moiety." But whatever doubt there might have been if this were a case of construction upon the words of a will, it has been long settled that cross remainders cannot be implied in a deed. The case of *Nevell v. Nevell*, 1 Roll. Abr. 837, is very strong to this purpose ; for there was a plain intent to create them which failed for want of strict technical words of limitation. That was a feoffment to the use of one in tail ; remainder to *J. S.* and *J. D.* and the heirs male of their bodies ; and for default of such issue of either of them, to the use of the *survivor* of them having issue male, and to the *issue* male of such issue male of their body ; remainder over. By this *J. S.* and *J. D.* were holden to have several inheritances, and no cross remainders in tail, for default of the word *heirs*. This principle was also fully established in *Cole v. Levington*, 1 Ventr. 224, *Twissden v. Looke*, Ambl. 665, and *Doe v. Wainewright*, 5 Term Rep. 427, in which latter case there were express cross remainders created by proper technical words of limitation ; and the only question was, which of the children they embraced by the application of the word *surviving* ? To this purpose also the case of *Doe dem. Tanner v. Dorell*, 5 Term Rep. 518, is directly in point. There an estate in default

of appointment was conveyed to the use of "*all and every* the children of "*B.* and the heirs of their several and respective bodies lawfully issuing, as tenants in common, &c. and in default of *all such* issue, "to the use of the right heirs of the settlor." Lord *Kenyon* there said, that if the question had arisen on the construction of a will, the argument that cross remainders might have been implied would have deserved consideration: for the ultimate limitation was given in default of *all such* issue, &c.; but that it had been properly admitted, that in the case of a *deed* cross remainders could not be implied; and would be removing the land marks of real property to bring that rule into question. And there the Court held, that as each child died without issue, his share fell into the reversion. Now here it must be admitted, that cross remainders are not created by proper technical words of limitation: then if notwithstanding the want of such words they can be said to be expressed, it will be difficult to say what is an application. All the cases of wills, which have been referred to as supporting the construction of cross remainders, go pointedly upon the ground of implication. It must also be admitted, that in this case by the words "share and share alike "equally to be divided between them," &c. the daughters took as tenants in common (a) several estates of inheritance, Co. Litt. 189, a.; and that in this respect there is no difference between a deed of uses and a common law conveyance (b). Then those several estates would, by the rules of the common law, descend and revert severally, unless there be a subsequent distinct limitation, with proper words of limitation, to carry each part over to the other daughters on failure of their respective heirs of the body. Without such words, however strong the intent may appear from other limitations to other persons, cross remainders, which are conveyances of new estates, can only arise, if at all, by implication. The certificate in *Wright v. Holford*, from whence alone the grounds of decision of the court can be collected, does not profess to adopt the argument urged for the defendant, that cross remainders were expressed in that case; but on the contrary states grounds which shew that they were implied. And in the absence of any authority for saying, that such was the opinion of the Judges in that case, the Court would not presume that they had adopted a ground of construction unsupported by former authorities, and subversive of generally received doctrines; and that without assigning any reasons of their own. No aid can be derived from the consideration that this is a marriage settlement; for whatever latitude of construction may be admitted upon marriage articles, or however in some cases a settlement may be reformed by order of the Court of Chancery with reference to such prior articles, yet in a court of law the same rules of construction must apply to this as every other deed. And besides, here are no introductory words limiting the settlement of the estate to the descendants of the marriage, as long as any should remain. And the concluding words, though words of course, seem intended to preclude any other estate being raised by implication, beyond what is positively expressed. He then intimated, that if the Court entertained any doubt on this point, which went to the whole of the action, he was prepared to shew that at least as to two fourths the lessor of the plaintiff was precluded from recovering by the operation of the fine, and the length of time which had run. But the Court said, they would hear the plaintiff's counsel reply on the general ground.

Sturges, in reply, maintained, that in the case of *Wright v. Holford* the Court had gone expressly upon the distinction of there being no words, such as *respectively*, or the like, to sever the titles; and that the limitation over being in default of *all* the issue, as the word *such* here imported, the rule of con-

(a) *Loveacres v. Blight*, Cowp. 352. *Denn v. Gaskin*, ib. 660. *Fisher v. Wigg*, Salk. 392.

(b) *Rigden v. Vallier*, 2 Ves. 256. *Goodtitle v. Stokes*, 1 Wils. 341, and *Doe v. Morgan*, 3 Term Rep. 765.

struction laid down as between two in favour of cross remainders should prevail: and this is supported by what Lord *Mansfield* said in the subsequent case of *Phipard v. Mansfield*. That in the case of *Nevell v. Nevell* there was no limitation by way of cross remainder to the heirs of the body, as there is here by the construction of the words "in default of *such issue*," which mean in default of the heirs of the body of all and every such daughter. And that in *Doe d. Tanner v. Dorvell*, the words "*several and respective*" being introduced in the limitation to the heirs of the body of the daughters brought that case within the distinction before established. That the concluding words in this case still left the construction open to what was before expressed, and that in this case cross remainders were before expressed.

LORD KENYON, C. J. There is a great distinction between the case of *Wright v. Holford* and the present. That was a case of construction upon similar words in a will, in which cross remainders may be raised by implication: this is the case of a deed in which by the practice of centuries no such implication can be raised. And it would be of most dangerous consequence to have this point disputed, upon which so many titles must depend. It has been often said, that it would have been much better for the public, if certain technical forms of words used in deeds of conveyance, the import of which is well understood, had been required to be adhered to even in the case of wills, though the intention of an hundred testators had been thereby defeated; for by degrees such words would long ago have slid into general use, and been well known; and thereby an infinity of doubt, litigation, and expence would have been saved. However we can now only lament that it has been otherwise settled in the construction of wills. But with regard to deeds the rule is positively settled, that there can be no implication whatever in a deed. It is probable, that it was intended that no part of the settled estate should go over as long as there were any issue of the marriage remaining; but the parties have not said so. There are certain words used to express such an intention in deeds, which are well known^(a): those have not been adopted in the present case, but the framers of this settlement have left that intention to be implied from other words, which cannot be done. I will not go through all the cases; because they are collected with great ability by Mr. Serjt. *Williams*, in a note in his edition of *Saunders' Reports*^(b), to which I refer in general. They establish the proposition I have before laid down in respect to the construction of deeds, which never has been or can be suffered to be doubted, without affecting an infinite proportion of the property of the kingdom, and removing landmarks.

GROSE, J. The distinction has been long known between raising cross remainders between two, and between more than two, even in the case of wills; and in arguing the case of *Phipard v. Mansfield*, I held myself bound to admit that in the latter case the presumption was against raising them by implication to which I remember that Lord *Mansfield* fully assented at the time. Then in order to distinguish this from the other cases, it is argued that here they are expressed. But there it is a common appropriate mode of creating cross remainders in deeds, and at least it may be said, that that mode has not been adopted in this settlement. Then if they have not been expressed in proper technical terms, they can only be raised, if at all, by implication. But to imply cross remainders in a deed would be directly contrary to all the authorities and the settled rule of law.

LAWRENCE, J. The argument for the lessor of the plaintiff rests principally upon the case of *Wright v. Holford*, where, upon a limitation very similar to the present, cross remainders were raised by implication. But that case

(a) See the usual form in the continuance of Mr. Serjeant *Williams'* note upon *Cook v. Gerard*, 1 Saund. 185-6.

(b) Ib. 185, note c.

has been well distinguished on the general rule on which the argument has turned: for there the question arose on the construction of a will, in which case cross remainders may be implied, and here it arises on a deed, where they cannot. That distinction which runs through the cases has not been denied: but it has been argued that the Court there held that cross remainders were *expressly* raised by the words there used. That however was not said by the Court: nor indeed did Mr. *Hargrave* so much argue that there were *express limitations* of cross remainders as that the testatrix's *intention* to raise them was *expressly declared*. An express declaration of such an intent might do very well in a will, which would not suffice in a deed. As if a testator say, "that there shall be cross remainders" between daughters, &c. that would be sufficient to raise them in a will, though it would not do in a deed for want of proper words of limitation: for in order to raise cross remainders in a deed between the issue of the first takers, there must be a limitation to the heirs of the body, which is not necessary in a will. It is said, that this is distinguishable from the case of *Doe v. Dorvell*, because of the word *respective* there introduced in the limitation to the heirs of the bodies of the children. But notwithstanding that word, if the intention of the parties to the deed could have prevailed without proper words to convey it, it was as plainly to be collected there as in any of the other cases referred to, in favour of raising cross remainders; for the remainder over was in default of *all* the issue; which was noticed by Lord *Kenyon*; and yet it was expressly said by his lordship, and so determined by the Court, and the contrary not attempted to be argued at the bar, that being the case of a deed, no such implication could be made. The question therefore in this case is not, Whether the parties to the deed have expressly declared their intention to raise cross remainders; but, Whether they have made use of such words as are necessary to raise them in a deed?

LE BLANC, J. The distinction is well settled, that in a deed cross remainders shall not be raised by implication; in a will they may. Here, however, it is contended that cross remainders are expressly limited: but I agree with my brother *Lawrence*, that it is not sufficient in a deed, that you may collect such an intention of the parties from the words, but cross remainders must be expressly limited by proper words of conveyance. The argument urged by the counsel for the lessor of the plaintiff rather goes to shew, that here there is an express declaration of such an intent, than that there is an express limitation of cross remainders. The case of *Doe v. Dorvell* cannot be distinguished in principle from the words here used; for whatever the intent might have appeared to be, yet being the case of a deed, the distinction was expressly taken that cross remainders could not be implied. Therefore, here there being no express limitation of cross remainders, the case falls within the rule established by all the authorities, and there must be judgment for the defendant.

Postea to the defendant(1)(2).

(1) As to what words will, and what will not create cross remainders in a deed; and under what circumstances cross remainders will, and under what they will not be implied in a will, see, besides the authorities referred to in the text, 4 Cruise's Dig. 459 to 467. Co. Litt. 159 b. n. (1). by Buller *Watson v. Foxon*, 2 East, 36. *Roe d. Wren & al. v. Clayton*, 6 East, 628. *Doe d. Georges & al. v. Webb*, 1 Taun. 234. *Hungerford v. Anderson*, 4 Day's Ca. 368.

(2) [The rule of property laid down in *Doe v. Worsley*, and the distinction between raising cross remainders by implication in a will and in a deed, has been adhered to in the U. States where the question has been raised. See the authorities collected in 2d *Hilliard's Abridgment*, pp. 44, 5, 6, 48, 9. 4 *Kent*, 193.—W.]

M'Connell and Varlett v. Johnston.

1 East, 481. May 8, 1801.

If one of the plaintiffs reside within reach of the process of the Court, security will not be required for the costs, though the other plaintiff be a foreigner residing abroad: and though the first-mentioned plaintiff be a bankrupt in execution for a debt.

LAMBE moved for a rule to stay proceedings in an action of *assumpsit*, till security was given by the plaintiffs for the costs; one of them (*Varlett*) being a foreigner residing abroad, and the other a bankrupt in custody in execution for a debt. But

The Court denied the motion in the first instance, one of the plaintiffs being within the jurisdiction of the court, and within reach of its process, and not coming under any of the rules requiring security to be given for the costs(a).

Barlow v. Bishop.

1 East, 482. May 8, 1801.

Though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him, (in the course of carrying on a trade in her own name by the consent of her husband,) yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff: neither can the plaintiff recover upon the money counts under such circumstances.

THIS was an action by the indorsee of a promissory note against the maker, which note was drawn payable to one *Ann Parry* or order, at two months after date, for 41*l.* 10*s.* and by her indorsed to the plaintiff. The first count of the declaration was upon the note, to which were added the common money counts. It appeared in evidence before Lord *Kenyon*, at the trial at the last *Middlesex* sittings, that *Ann Parry* was a married woman, carrying on trade at *Birmingham* in her own name with the consent of her husband; and that the plaintiff, who lived in *London*, and furnished her with goods to the amount of the note, dealing with her as a feme sole. That the plaintiff after much delay, having pressed for payment, the defendant, with a view to serve Mrs. *Parry*, gave her the note in question, with knowledge of her being married, and with a view that she should pay it over to the plaintiff, in order to stop his proceeding against her, which she did by indorsing it over to him. A verdict was taken for the plaintiff, with leave to the defendant to move the court to enter a nonsuit, if they should be of opinion that the plaintiff could not recover upon any of the counts.

Gibbs, on a former day, obtained a rule *nisi* for this purpose, on the ground that by the delivery of the note to *Ann Parry* for her use, it became the property of her husband, and she could not pass it away by her own indorsement. And that no consideration having passed for the note between these parties

(a) In *Webb v. Ward*, 7 Term Rep. 246, an uncertificated bankrupt, in whose name an action of trover was brought, (though in reality under the direction of the assignees,) was required to give security for the costs: Lord *Kenyon* saying, that the Court would not lay it down as a general rule that an uncertificated bankrupt must in all cases give such security: but that it was fair to require it where the action was brought for the benefit of the assignees. And in 1 Tidd's Prac. 446, a case is mentioned of *Sutton v. Sutton*, Trin. 28 Geo. 3, where upon the general ground the Court doubted whether an uncertificated bankrupt bringing an action should be compelled to give security for the costs, and ordered it to stand over till the following term.

nor indeed any consideration received for it by the defendant, the plaintiff could not recover upon either of the money counts.

Erskine and *Espinasse* now shewed cause against the rule; and admitting that by the delivery of the note to the wife for her use, the property vested in the husband; they contended, first, that as she carried on trade in her own name with her husband's consent, all acts done by her in the course of such trade must be taken to be with the knowledge and consent of her husband; and he having permitted her to indorse the note in question, it in effect became his own indorsement. But secondly, if the property in the note could not pass by her indorsement, though made with her husband's consent, then as the defendant knew that she was a married woman, and that the object of making the note payable to her was, that she might indorse it to the plaintiff, which by law was a nullity; it is the same in legal effect as if the note were either made payable to a fictitious person, in which case it became payable to bearer, as in *Gibson v. Minet*, 3 Term Rep. affirmed in Dom. Proc, 1 H. Blac. 569—625; or as if it were made payable to the plaintiff himself, for whose use it was expressly given. Perhaps too, under the special circumstances of the case, the giving this note may be considered as evidence under the money counts of the defendant's having received so much money for the use of the plaintiff in payment of his demand upon *Ann Parry*; or, as in *Fenner v. Mears*, 2 Blac. 1269, it amounts to an agreement by the defendant, to hold so much money for the use of the person to whom *Ann Parry* herself should indorse the note.

Lord KENYON, C. J. I saved the point at the trial, not from any doubt entertained by myself at the time, but to give an opportunity to the plaintiff's counsel to see if there were any ground upon which the action could be sustained: but none has been or can be stated. It is clear that the delivery of the note to the wife vested the interest in her husband; and as he permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, if she had indorsed the note in the name of her husband, I am not prepared to say that that would not have availed; as many acts of this nature may be done by a power of attorney; and the jury might have presumed what was necessary in favour of an authority from her husband for this purpose. But the indorsement being in her own name, it is quite impossible to say that she could pass away the interest of her husband by it. And this is not like a note payable to the order of a fictitious person to whom no interest can pass; but here the interest passed to the husband. Neither is there any colour for saying that the plaintiff can recover upon the money counts. No money passed between these parties. In *Fenner v. Mears* there was an express agreement to pay the money to any person to whom the bond should be assigned; it does not therefore bear upon the present case.

Per Curiam,

Rule absolute for entering a nonsuit(1).

(1) [A promissory note given to a feme covert for her separate use, for the consideration of her distributive share in an intestate estate, becomes immediately the property of the husband. *Com'th v. Manly*, 12 Pick. 173. The husband is not liable on a negotiable note given by his wife even in a suit by a bona fide indorsee, unless it was given with his authority or approbation, and that must be shown before such note is admissible in evidence against him. The husband's authority cannot be inferred from his knowledge that the wife was carrying on business, and gave the note in the course of it. *Reakert v. Sanford*, 5 W. & S. 164.—W.]

Allen v. Keeses.

1 East, 435. May 8, 1801.

A draft on a banker post-dated, and delivered before the day of the date, though not intended to be used till that day, requires to be stamped by the stat. 31 Geo. 3. c. 25.

THIS was an action brought against the drawer of a bill of exchange payable to bearer for 20*l.*, bearing date the 18th day of the month. It appeared in evidence before Lord *Kenyon* at the trial at *Guildhall*, that the bill (which was a common banker's check) was in fact drawn on the 14th preceding, though bearing date four days afterwards, and was thus post dated, because it was not intended that it should be presented for payment till the 18th: whereupon it was objected, that in effect this was a bill payable four days after date, and therefore ought to have been upon a stamp; otherwise the stamp-act would be entirely evaded, by drawing bills of the date on which they were intended to be payable. Lord *Kenyon* inclined to this opinion; but permitted a verdict to be taken for the plaintiff, with liberty to the defendant to move the court to enter a nonsuit, if upon examination of the act of parliament the objection appeared to be well founded.

The stat. 31 Geo. 3. c. 25. imposes a certain duty (increased by the stat. 37 Geo. 3. c. 20.) upon any bill of exchange, draft, or order for the payment of money on demand, and so much where payable otherwise than on demand; with a proviso (s. 4.) to exempt any draft or order for the payment of money to the bearer on demand bearing date on or before the day on which the same shall be issued, &c.

Gibbs having obtained a rule *nisi* for entering a nonsuit,

The Attorney-General and *Wigley* shewed cause, saying, that as no use was intended to be or could be made of the draft till the 18th, when it was payable, it was the same as if it had not been issued till that day. But

Lord *KENYON*, C. J. after looking at the act, said, that the case was too clear for argument: the manner in which the clause of exemption was worded expressly excluded this case.

Per Curiam,

Rule absolute for entering a nonsuit.

M'Clure v. Dunkin, Knight.

1 East, 436. May 8, 1801.

In an action on a judgment recovered on a bond interest may be recovered in damages beyond the penalty of the bond.

IN *assumpsit* on a judgment recovered in *Ireland*, in *Michaelmas* term 1777, the declaration set forth a bond given by the defendant to the plaintiff, dated the first of *July* 1777, for 653*l.* 10*s.* 9*d.* (reduced to *English* money); a judgment recovered thereon as above mentioned, with costs and damages 1*l.* 19*s.*, and a revival of such judgment by *scire facias* in *Easter* term 1794; in consideration whereof the defendant promised to pay the said several sums, &c. The plaintiff also declared on the common counts. The defendant pleaded *non assumpsit*. And at the trial before Lord *Kenyon*, C. J. at the sittings after last term, the plaintiff obtained a verdict for 752*l.* 17*s.* 6*d.*, which included interest upon the judgment.

Upon a rule to shew cause why the verdict should not be reduced to the sum of 655*l.* 9*s.* 9*d.*, which was the amount of the penalty of the bond and the costs, &c. the sole question was, Whether the plaintiff were entitled to recover interest on the judgment beyond the penalty of the bond, and costs of the judgment?

Gibbs shewed cause, and contended that the sum recovered by the judgment constituted a new debt; and therefore, though in an action on the bond itself interest could not have been recovered beyond the penalty, yet after the judgment the bond debt became merged in another security, on which interest might by law accrue without any such limitation.

Burrough, in support of the rule, said, that this being the case of a foreign judgment, the doctrine of merger did not apply; for it was no more than evidence of the debt (*a*), and of no higher nature than the bond itself. The Court, therefore, were not precluded from referring back to the original security on which the judgment was founded; all which appeared upon the face of the declaration; and if according to the legal effect of that original security interest could not be recovered beyond a certain amount, the plaintiff ought not to be permitted to recover more in a different form of action for the same debt. To shew that interest could not be recovered beyond the penalty of the bond, he referred to *Bremley v. Goodere*, 1 Atk. 75. *Tew v. The Earl of Winterton*, 3 Brown Ch. Rep. 489. *Knight v. Maclean*, Ib. 496. and *Wilde v. Clarkson* (*b*).

Lord KENYON, C. J. : If this had been an action on the bond, the objection would have holden good; but after judgment recovered, *transit in rem judicatam*; the nature of the demand is altered: and this being an action on the judgment, it was competent to the jury to allow interest to the amount of what was due. In this respect I see no difference between a foreign judgment, and a judgment in a court of record here.

Per Curiam,

Rule discharged (1) (2).

The King v. The Inhabitants of Lillington.

1 East, 438. May 9, 1801.

A certificate directed to the parish of *A*. or any other in *C*. will operate upon delivery to the parish of *B*. which is also in *C*. By the stat. 8 & 9 W. 3: c. 30. such certificate need not be directed to any particular parish.

TWO justices removed *William Leeson*, Sarah his wife, and their children by name, from the parish of *St. Michael* in the city of *Coventry* to the parish of *Lillington* in the county of *Warwick*. The sessions on appeal confirmed the order of removal, subject to the opinion of this Court on the following case.

The pauper was born in the parish of *Lillington* in the county of *Warwick*, where his parents were legally settled. In 1751, when the pauper was very young, his father obtained a certificate from the parish officers of *Lillington*, whereby they acknowledged the pauper's father and mother and the pauper to be their inhabitants legally settled in the said parish; and the said certificate was directed as follows, (viz.) "To the churchwardens and overseers of the poor of the parish of *Holy Trinity*, or any other parish, in the city "and county of *Coventry*." The pauper's father and mother brought the

(a) Vide *Walker* and others assignees of *Bean v. Willer*, Doug. 1. and the cases there cited.

(b) 6 Term Rep. 303. which over-ruled *Ld. Lonsdale v. Church*, 2 Term Rep. 388.

(1) Vide *Carter v. Carter*, 4 Day's Ca. 80, where most of the cases prior to that time are collected, and the more recent cases of *The United States v. Arnold & al.* 1 Story's Rep. 348. 360. *Hefford v. Alger*, 1 Taun. 218. See also *Smedes v. Hooghaling*, 1 Caines, 48.

(2) [Interest beyond the penalty of a bond may be recovered in the shape of damages. The decisions in the U. States upon this point, have been very uniform, and in one case, *Harris v. Clap*, 1 Mass. 308, even against a surety, the rule has been held to apply. See *Boyd v. Boyd*, 1 Watts, 365. *Pitts v. Tilden*, 2 Mass. 118. *Warner v. Thurlo*, 15 do. 154. 3 Caines, 48. 3 Wend. 444. 6 Johns. Ch. R. 452. 7 do. 17. 2 Gill & Johns. 279.—W.]

pauper with them and the certificate to *Coventry*, and delivered the certificate to the parish officers of *St. John the Baptist* in the said city. When the pauper was about eight years of age, he was bound an apprentice to *J. S. of St. John the Baptist* for the term of eight years, and served his master accordingly in the said parish, and hath done no other act to gain a settlement. The counsel for *Lellington* objected to the validity of the certificate, insisting that the same was not valid by reason of the uncertainty of the direction. But the court of quarter sessions were of opinion the same was a valid certificate.

Gibbs, *Reader*, and *B. Morris*, in support of the order of sessions, after stating the question to be, whether it were necessary to the validity of a certificate that it should be directed to that parish to which it was delivered, and under which the paupers were received and permitted to dwell there, were stopped by -

Lord KENYON, C. J., who observed, that it was a settled point that a certificate need not be directed to the particular parish to which it was delivered. That the only dictum to the contrary was a loose expression of his own in the case of *The King v. Wymondham*(a), which the principal question in the case did not call for. So far what was said was right, that a certificate was not a transferable instrument from one parish to another; for then it would operate as a licence for vagrancy: that is after it has performed its office in one parish, it cannot be taken to another for the same purpose; and so from parish to parish as often as the certificated person shall choose to remove himself.

The Attorney-General and *Clarke* for the appellants contended that the opinion alluded to, though contrary to the case of *Rex v. St. Nicholas, Harwich*, Burr. S. C. 171, was founded in reason and convenience; and the reason given by *Wright*, J. for the decision in that case, viz. that it is an acknowledgment by the certifying parish that the party named in the certificate is their parishioner, which is conclusive against them as to all the world, was certainly ill founded, and had been since over-ruled(b). That the certificate in question must be taken either to have been directed to the parish of the *Holy Trinity*, or not directed at all; and in either case it would operate as a licence for vagrancy, if by delivery to a parish not named it could have any effect; for the party to whom it is given need not produce it to the officers of the parish into which he went till he was about to be removed; and then he might carry it into whatever other parish he pleased. It would also open a door to collusion between parishes; for after the death of a pauper, who alone could in most cases prove the delivery, it might be handed over from one parish to another as the occasion required, and nothing would appear upon the face of it to shew that it was not granted to the particular parish by whom it was produced, who might prove it by a witness who had taken it out of the parish chest, ignorant of the circumstances under which it had been placed there.

GROSE, J. The act of the 8 & 9 W. 3. c. 30., upon which alone the question turns, does not require that the certificate should be directed to any particular parish. And in the case alluded to of *St. Nicholas, Harwich*, it was expressly determined, not only that no such direction was necessary, but that even a misdirection would not avoid the certificate.

LE BLANC, J. The case of *St. Nicholas, Harwich*, has settled the point. And the expression made use of by Lord Kenyon in *R. v. Wymondham* must

(a) 6 Term Rep. 552. His lordship most frankly and obligingly took the inaccuracy of expression upon himself, in exoneration of the reporters, who might probably from inadvertence have used a word which carries his opinion further than he intended.

(b) Vide *R. v. Bishopside*, Burr. S. C. 381. *R. v. Lubbenham*, 4 Term Rep. 251. and other cases.

be taken with reference to the particular point then in judgment, beyond which it cannot be supported.

Per Curiam,

Both Orders confirmed(a).

Doe on the Demise of Bradshaw v. Ploughman.

1 East, 441. May 9, 1801.

Ejectment will not lie for a message and tenement.

THIS was an ejectment for two messuages, two dwelling-houses, and two tenements. And after verdict

Lambe moved in arrest of judgment, because of the uncertainty of the latter description; which, though it was holden to be well enough in *Doe v. Denton*(b), yet that case passed by surprise and was not law, being contrary to adjudged cases; viz. *Goodtitle v. Walton*, 2 Stra. 834, and *Goodright v. Flood*(c). And after hearing

Mingay against the rule,

The Court, upon a review of the precedents, made the

Rule absolute to arrest the Judgment(1).

Brudenell and Brooks v. Elwes and Others.

1 East, 442. May 12, 1801.

A power of appointment under a marriage settlement unto and among all or any the child or children of the marriage for such estates as the husband and wife, or the survivor of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment reserving to them and the survivor a power of revocation and appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, &c. remainder to the daughter in fee, all the limitations subsequent to that to the eldest son for life are void, as being an excess beyond the power; and the ultimate remainder dependant upon such intermediate limitations, though made in favour of one of the objects of the power, is also void; and shall not be accelerated by the event of such void intermediate limitations not having taken effect, for want of issue male of the eldest son, &c. to whom the appointment was made. For an appointment not good in its creation will not become so by subsequent circumstances. And such an appointment, being by deed, cannot be construed *cy pres*, so as to give the sons estates tail, as perhaps might have been the case if the appointment had been by will.

BY articles of agreement, dated the 16th of Dec. 1730, made previous to and in contemplation of the marriage of *Jerningham Cheveley* with *Louisa Mary Jamineau*, *John Cheveley* the father and *Jerningham Cheveley* covenanted with *John* and *Isaac Jamineau* (trustees therein named) and their heirs, &c. that they would, within six months after the marriage, convey and assure the manor of *Garlands* and certain other lands in *Essex* therein mentioned, to the use of *Jerningham Cheveley* for life, remainder to *Louisa Mary* for life, remainder to the trustees and their heirs, upon trust to convey and assure all or any part thereof unto and among all or any the child or children of the

(a) The delivery of the certificate gives it operation. *R. v. Wensley*, 5 Term. Rep. 164.

(b) 1 Term Rep. 11. and vide *Cottingham v. King*, 1 Burr. 625. Ejectment for messuages, lands, &c. in Ireland with the town and tenement of *B.* and held well after verdict; as such denominations of land might be known there.

(c) 3 Wils. 23. See also *Popham*, 177. March, 96, and several cases where an ejectment for a message or tenement was also holden bad after verdict. Noy. 96. 3 Mod. 238. 1 Sid. 295. 1 Ld. Ray. 191. and *Qto. Barnes*, 178.

(1) Vide *Goodtitle d. Wright v. Otway*, 3 East, 287.

body of *Jerningham Cheveley* on the body of *Louisa Mary* to be begotten, in such parts and proportions, and for such estate and estates, and with and under such charges, provisoes, conditions, and limitation as *Jerningham Cheveley* and *Louisa Mary*, or the survivor of them, should from time to time, by any deed or writing, either with or without power of revocation, to be by him, her, or them duly signed and sealed in the presence of three or more credible witnesses, or by his or her last will in writing testified in manner aforesaid, direct, limit, or appoint: And in default of such appointment, to the use of the first and other sons of the body of *Jerningham Cheveley* on the body of *Louisa Mary Jamineau* in tail male successively; remainder to trustees upon divers trusts, (which are since become incapable of taking effect;) remainder to the right heirs of *Jerningham Cheveley* for ever. The marriage took effect: and by indentures of lease and release of the 20th and 21st of September 1768, made between *Jerningham Cheveley* and *Louisa Mary* his wife of the one part, and *Isaac Jamineau* (the surviving trustee) on the other part, reciting the said articles, and that there was issue of the marriage then living two sons, namely, *Jamineau* and *Jerningham Cheveley*, and a daughter *Jane Cheveley*, all of whom had respectively attained the age of 21 years: *Jerningham Cheveley* the elder (his father *John Cheveley* being dead) granted and conveyed unto *Isaac Jamineau* and his heirs the manor of *Garlands* and other lands mentioned in the articles, to the use of him the said *J. C.* the elder for life, remainder to the use of *L. M.* his wife for life, by way of jointure; remainder to the use of all or any the child or children of the body of *J. C.* the elder on the body of *Louisa* his wife lawfully begotten and to be begotten, in such parts or proportions, and for such estate and estates, and with and under such charges, provisions, conditions, and limitations, as *J. C.* the elder and *L. M.* his wife, or the survivor of them, should from time to time, by any deed or writing, either with or without a power of revocation, to be by him, her, or them duly signed and sealed in the presence of three or more credible witnesses or by his or her last will in writing testified in manner aforesaid, direct, limit, or appoint. And in default of such appointment, then (in strict settlement) to the use of the first and other sons of the marriage successively in tail male; and in default of such issue, to the use of the settlor's right heirs. By indenture dated the 22d of September 1768, duly executed by *Jerningham Cheveley* the elder and *Louisa Mary* his wife of the one part, and *Jerningham Cheveley* the younger and *Jane Cheveley* of the other part, reciting the said articles and indentures of lease and release, and that *J. C.* the elder and *L. M.* his wife were desirous of making some provision for *Jane Cheveley* their daughter, and also for *Jerningham Cheveley* the younger, they the said *Jerningham Cheveley* and *Louisa Mary* his wife, by virtue of the power and authority reserved to them by the articles of agreement and indentures, directed, limited, and appointed unto and to the use of *Jane Cheveley*, her heirs and assigns for ever, the reversion in fee expectant upon and to take effect in possession after the decease of *Jerningham Cheveley* the elder, and *Louisa Mary* his wife, of and in the manner of *Garlands*, &c. upon trust, by demise or mortgage, &c. to raise 1000*l.* for the benefit of *Jerningham Cheveley* the younger. In which deed there was a proviso, that it should be lawful for *Jerningham Cheveley* the elder, and *Louisa Mary* his wife, and the survivor of them, from time to time, or at any time or times during the lives of them or the survivor of them, by any deed or instrument in writing, with or without power of revocation, sealed and delivered by them or the survivor of them, and in the presence of and attested by two or more credible witnesses, (but subject and without prejudice to the raising of the said 000*l.*) to revoke, alter, annul, or make void the said limitation or appointment thereby made to or in favour of the said *Jane Cheveley*, her heirs and assigns as aforesaid; and by the same deed or instrument in writing, or by any other such like deed or instrument in writing, to be by them the said

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body of *Jerningham Cheveley* on the body of *Louisa Mary* to be begotten, in such parts and proportions, and for such estate and estates, and with and under such charges, provisos, conditions, and limitation as *Jerningham Cheveley* and *Louisa Mary*, or the survivor of them, should from time to time, by any deed or writing, either with or without power of revocation, to be by him, her, or them duly signed and sealed in the presence of three or more credible witnesses, or by his or her last will in writing testified in manner aforesaid, direct, limit, or appoint : And in default of such appointment, to the use of the first and other sons of the body of *Jerningham Cheveley* on the body of *Louisa Mary Jamineau* in tail male successively ; remainder to trustees upon divers trusts, (which are since become incapable of taking effect ;) remainder to the right heirs of *Jerningham Cheveley* for ever. The marriage took effect : and by indentures of lease and release of the 20th and 21st of September 1768, made between *Jerningham Cheveley* and *Louisa Mary* his wife of the one part, and *Isaac Jamineau* (the surviving trustee) on the other part, reciting the said articles, and that there was issue of the marriage then living two sons, namely, *Jamineau* and *Jerningham Cheveley*, and a daughter *Jane Cheveley*, all of whom had respectively attained the age of 21 years : *Jerningham Cheveley* the elder (his father *John Cheveley* being dead) granted and conveyed unto *Isaac Jamineau* and his heirs the manor of *Garlands* and other lands mentioned in the articles, to the use of him the said *J. C.* the elder for life, remainder to the use of *L. M.* his wife for life, by way of jointure ; remainder to the use of all or any the child or children of the body of *J. C.* the elder on the body of *Louisa* his wife lawfully begotten and to be begotten, in such parts or proportions, and for such estate and estates, and with and under such charges, provisions, conditions, and limitations, as *J. C.* the elder and *L. M.* his wife, or the survivor of them, should from time to time, by any deed or writing, either with or without a power of revocation, to be by him, her, or them duly signed and sealed in the presence of three or more credible witnesses or by his or her last will in writing testified in manner aforesaid, direct, limit, or appoint. And in default of such appointment, then (in strict settlement) to the use of the first and other sons of the marriage successively in tail male ; and in default of such issue, to the use of the settlor's right heirs. By indenture dated the 22d of September 1768, duly executed by *Jerningham Cheveley* the elder and *Louisa Mary* his wife of the one part, and *Jerningham Cheveley* the younger and *Jane Cheveley* of the other part, reciting the said articles and indentures of lease and release, and that *J. C.* the elder and *L. M.* his wife were desirous of making some provision for *Jane Cheveley* their daughter, and also for *Jerningham Cheveley* the younger, they the said *Jerningham Cheveley* and *Louisa Mary* his wife, by virtue of the power and authority reserved to them by the articles of agreement and indentures, directed, limited, and appointed unto and to the use of *Jane Cheveley*, her heirs and assigns for ever, the reversion in fee expectant upon and to take effect in possession after the decease of *Jerningham Cheveley* the elder, and *Louisa Mary* his wife, of and in the manor of *Garlands*, &c. upon trust, by demise or mortgage, &c. to raise 1000*l.* for the benefit of *Jerningham Cheveley* the younger. In which deed there was a proviso, that it should be lawful for *Jerningham Cheveley* the elder, and *Louisa Mary* his wife, and the survivor of them, from time to time, or at any time or times during the lives of them or the survivor of them, by any deed or instrument in writing, with or without power of revocation, sealed and delivered by them or the survivor of them, and in the presence of and attested by two or more credible witnesses, (but subject and without prejudice to the raising of the said 000*l.*) to revoke, alter, annul, or make void the said limitation or appointment thereby made to or in favour of the said *Jane Cheveley*, her heirs and assigns as aforesaid ; and by the same deed or instrument in writing, or by any other such like deed or instrument in writing, to be by them the said

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Jane Cheveley before her death made her will, duly executed and attested to pass real estates; whereby after reciting that she was entitled for her life, and also to the reversion or remainder in fee to the manor of *Garlands*, &c. she gave and devised her aforesaid reversion in fee, and all and singular her estate and interest whatsoever in the said manor and hereditaments, unto and to the use of the plaintiffs *G. B. Brudenell*, *G. Brooks* and *Elizabeth Morley*, (which last is since dead,) and their heirs, upon certain trusts in her will mentioned; and she died without revoking or altering her said will. Soon after her death, the plaintiffs, the surviving devisees in trust under her will, contracted with the defendant *Elwes* for the sale of the manor and premises; but he afterwards objecting to the title of the trustees, they instituted a suit in chancery against him and others, for the purpose of compelling him to complete his purchase; which coming on to be heard before the Lord Chancellor on the 6th of *August* 1800, his Lordship directed the above case to be made for the opinion of this court upon the following questions; viz. Whether the deed of appointment of the 22d of *September* 1768, which was executed by *Jerningham Cheveley* the elder and *Louisa Mary* his wife jointly, were, as to the estate thereby appointed to *Jane Cheveley*, well revoked by the subsequent deed of revocation and appointment of the 29th *March* 1773, executed by *Louisa Mary Cheveley* alone: and if the same were well revoked thereby, whether *Jane Cheveley* took under the last mentioned deed of appointment any and what estate in the manor of *Garlands*, and the other premises in question, which she had power to dispose of by will.

Adam for the plaintiffs. 1st, The deed of 1773 was not a good revocation of the deed of appointment of the 22d *September* 1768, not being made in conformity to or consistent with the articles of 1730, from whence the power moved. By those articles a power of appointment unto and among all or any of the children of the marriage, with or without a power of revocation, was given to the husband and wife, or the survivor of them, to be exercised from time to time by him, her or them. The words indeed are general, but the meaning evidently was, that if the husband or wife alone appointed, he or she alone might revoke their own appointment; but if both appointed, the revocation could only be by both: in other words, the same authority which made was required to revoke the appointment. The reason of this is evident: for it would have been nugatory to give a power of appointing jointly, if either singly could revoke the act: nor would it be reasonable that either might undo what both had determined to be the most proper method of providing for their family. Then the husband and wife having made a joint appointment by the deed of 1768, it was not competent for the wife after his death to revoke it, and make a new appointment. Nor was it in their power by the deed of 1768 to reserve a power of revocation to the survivor of them larger than the articles and settlement allowed; nor if so reserved, would it be valid. By the deed of appointment of 1768 *Jane Cheveley* the daughter took a vested remainder in fee after the determination of the life estates of her parents. But 2dly, If that deed were well revoked by the deed of 1773, *Jane Cheveley* still took a vested remainder in fee under it, which passed by her will to the plaintiffs. He admitted, that unless the case of *Doe d. the Duke of Devonshire v. Cavendish*(a) would support an appointment to the grandchildren, it was impossible to contend that the power here given enabled the husband or wife to make an appointment to any other than the children of the marriage. (And the Court intimating a decided opinion that the power could not otherwise be executed than among the children, he abandoned that point)(b). But he contended, that though the execution of the power were void as to the excess, yet the subsequent limitation

(a) Hil. 22 Geo. 3. B. R. cited in 4 Term Rep. 741.

(b) Vide *Alexander v. Alexander*, 2 Ves. 640 and other cases referred to in this report.

over to one who was an object of the power would be good, as in *Crompe v. Barrow*, 4 Ves. jun. 681, inasmuch as there were no children of *Jamincieu* or *Jerningham Cheveley*, the sons, to whom estates for life were limited, with remainders to their first and other sons in tail male; in default of which issue the remainder over in fee was limited to *Jane Cheveley*. [Lord *Kenyon*, C. J. Did not that case go upon the ground of its being an appointment upon a contingency with a double aspect; and therefore that the contingency which went beyond the power not having happened, it should not stand in the way of those who might take under the appointment in the event which happened and who were within the power?] Admitting that distinction, still the appointment here may hold good by giving the sons estates in tail male, by the doctrine of *Cy pres*, in order to carry into effect the general intent; as in *Chapman v. Brown*, 3 Burr. 1626. *Pitt v. Jackson*, 2 Bro. Ch. Cas. 51, and *Robinson v. Hardcastle*, 2 Term Rep. 241. and 781. Here the general intent was to give the sons estates for life, and the daughter *Jane Cheveley* the remainder in fee; and the particular intent was to give intermediate estates tail to persons who were not within the scope of the power, namely, the male descendants of the sons: therefore the only method by which the particular intent can be most nearly effectuated consistent with the general intent is, by giving the two sons successive estates in tail male, with remainder in fee to the daughter. [Lord *Kenyon*, C. J. The doctrine of *Cy pres* goes to the utmost verge of the law, even in the construction of wills; and we must take care that it does not run wild: But it has never been applied to the construction of deeds. The cases cited were questions upon wills. Perhaps no person has carried the doctrine further than I did when Master of the Rolls, sitting for the Lord Chancellor, in the case of *Pitt v. Jackson*. That also was the case of an appointment by will: and I know that great judges entertained considerable scruples at the time concerning that decision. It went indeed to the outside of the rules of construction; yet still I do not think it was wrong.] At any rate, then, this case is distinguishable from all the rest; inasmuch as the appointment of 1773 was made by a deed to which all the parties, being of full age, who were enabled to take under the power, and alone interested in it, were parties: their consent, therefore, will aid the execution of it in this manner; and it is not now competent to other parties to object to it.

Const. contra. First, it is now (a) clear that the wife after her husband's death had a power to revoke the former joint appointment; such power is expressly reserved to the survivor of the husband and wife by the original articles and settlement. It is also clear, that under a power of appointment to children, grandchildren or other descendants cannot be included; *Alexander v. Alexander*, 2 Ves. 640; but the power must be executed amongst the children alone. If, indeed, the execution of the power by the deed of 1773 were to refer back to the articles, it might be doubtful how far any part of the appointment was good: for as was said by *Buller, J.* in *Robinson v. Hardcastle*, 2 Term Rep. 251, every execution of a power must be coupled with the power itself, so that those who claim under the execution must derive their title from the power. And he considered that an appointment for life only to a person not in *esse* at the creation of the power would be bad; and cited a case of the *Duke of Marlborough v. Lord Godolphin*, in *Chancery*, Tr. 33. Geo. 2. (b)

(a) Lord *Kenyon* in the course of the argument had expressed a strong opinion to this effect, which he afterwards repeated.

(b) This, though differing in the title of it, seems to be the same case, or at least upon the same question, as the case reported in 5 Bro. P. C. 592. under the name of *Lord Charles Spencer and Others against the Duke of Marlborough, Lord Godolphin and others*. The attempt there was not merely to limit by a new appointment an estate for life to a person not in *esse* at the creation of the power, but farther to limit an estate tail to the issue of such unborn person. *Vide supra* what was said by Lord *Kenyon* on this subject; and *Godolphin v. Godolphin*, 1 Ves. 23; and *Thellusson v. Woodford*, 4 Ves. 227.

in support of that position. [Lord *Kenyon*. An unborn child may be made tenant in tail, but not tenant for life, *with a limitation to his children as purchasers*. I remember hearing Lord *Mansfield* say, that when the case alluded to was to be argued in the House of Lords, there was found to be a mistake in the printed reasons on the part of those who opposed the execution of the power in the manner intended; for it had been stated, that there could not be a limitation to an unborn child *for life*, but that was found to be wrong; for certainly there may be such a limitation: they therefore cancelled that reason and framed another, stating the proposition to be, that there could not be a limitation to an unborn child for life, with limitations to the issue of such unborn child in succession: and that doctrine was afterwards distinctly laid down by the learned Judge who delivered the opinion of the Judges in the House of Lords.] Admitting, then, that the power was well executed by the deed of 1773, as far as it goes, and that it will be only void for the excess, according to *Robinson v. Harcastle*, 2 Term Rep. 241, and other cases; here it will be good as far as it gives estates for lives to *Jane Cheveley* and *Jamineau*; but the next remainder to trustees who are not within the power, and all the subsequent remainders which depend thereon, will be void; and that will include the ultimate remainder to *Jane Cheveley* in fee, although she was within the power. For this purpose the cases before cited, and that of *Adams v. Adams*, Cowp. 651, are in point.

Adam, in reply, maintained that the deed of 1773, if not good as an appointment *Cy pres* of estates tail to the sons with the remainder in fee to *Jane Cheveley*, was altogether void as an appointment for life only to persons not *in esse* at the creation of the power. Then if void as a new appointment, it would also be void as a revocation, and therefore the deed of 1768 would be set up again.

LORD KENYON, C. J. We shall certify our opinion to the Lord Chancellor. At present, however, I see no reason to doubt but that the appointment by the wife alone, by the deed of 1773, was a good appointment as far as it is warranted by the power, and that it is a good revocation of the prior appointment of 1768. The marriage articles meant to give a joint power of appointment to the husband and wife during their lives, and after the death of either, that the survivor should have equal power to revoke and make a new appointment. It seems clear that an equal degree of confidence was reposed in both husband and wife; and as it could not be foreseen what alterations the exigency of the family might from time to time require, it was thought more prudent to leave the survivor of them, whichever it might be, the same power to mold the appointment that had been committed to both while living. The next point is too well settled to be broken in upon. The wife had no power under the articles to appoint to the children of unborn children, but she was confined to execute her power among the children. So far, therefore, as she appointed an estate for life to the daughter *Jane Cheveley*, with remainder for life to *Jamineau*, she did well; beyond that she exceeded her power in appointing to the issue of *Jamineau*, and therefore the excess is void. But it is equally clear that she did not intend that the subsequent limitation over to *Jane Cheveley* should be accelerated; but it was made to depend upon the intermediate limitations to the issue of her brothers, and she was not to take till their issue male were extinct. Those intermediate limitations therefore being void, the ultimate remainder dependent upon them must also fall. If, then, the appointment were originally bad for the excess, the subsequent circumstances of the death of the brother, without having had issue, cannot make it good. The appointment must be legal at the time of its creation. Therefore, the estate must go as in default of appointment, beyond the estates for life given to *Jane* and *Jamineau*, according to the directions of the settlement, to *Jamineau*, in tail male, remainder to *Jerningham* in tail male, with remainder to the right heirs of the father.

LAWRENCE, J. The case of *Robinson v. Hardcastle* is in point(a).

Afterwards the following certificate was sent to the Lord Chancellor :

This case has been argued before us by counsel ; we have considered it, and are of opinion, that the deed of appointment of the 22d of September 1768, which was executed by *Jerningham Cheveley* the elder and *Louisa Mary* his wife jointly, was, as to the estate thereby appointed to the said *Jane Cheveley*, well revoked by the subsequent deed of revocation and appointment of the 29th of March 1773, executed by the said *Louisa Mary Cheveley* alone. And we are of opinion, that under the said last mentioned deed of appointment, the said *Jane Cheveley* took an estate for life only in the manor of *Garlands* and the other premises in question, with a power to charge the same, when she should be in the actual possession thereof, with any sum not exceeding 1000*l.* And that she did not take any estate in the said premises under the said last mentioned deed of appointment, which she had power to dispose of by will.

May 18th, 1801.

KENYON.

N. GROSE.

S. LAWRENCE.

S. LE BLANC.

Doe one the Demise of John Biddulph v. Meakin.

1 East, 456. May 12, 1801.

Under a devise of "a messuage or tenement, buildings, lands, or premises, now in my own possession ; and all other my real estate whatsoever in *M.* or in any other place," &c. to *A.* for life ; and after her decease a devise of "the said messuage or tenement, buildings, lands, and premises" to *B.* in fee ; held that the word *premises* used in the devise to *B.* carried all that was before given to *A.*, and was not confined to the premises in the testator's own possession ; and consequently, that a reversion in fee of another messuage to which the testator was entitled after the determination of a life in being, in whose possession it was outstanding during his lifetime, passed to the devisee in remainder.

THIS was an ejectment for a certain messuage, out-houses, and land in the parish of *Stone* in the county of *Stafford*. At the trial before *Rooke, J.* at the last assizes for *Stafford*, several questions occurred ; but the only one upon which the Court delivered any opinion was on the construction of the will of *Thomas Biddulph*, the grandfather of the lessor of the plaintiff, who claimed as heir at law, (through his said grandfather to his great uncle *William*.) against the defendant, who derived title under *William Biddulph*, the testator's youngest son and devisee. By that will the testator devised as follows : "I give and devise all that my messuage, dwelling-house, or tenement, with the shop, barn, stable, and other buildings thereto belonging, which said messuage or tenement, buildings, lands, and premises, are now in my own possession, and all other my real estate whatsoever in *Murray* or elsewhere in the parish of *Yorall*, (in the county of *Stafford*.) or in any other place whatsoever in Great Britain, to my wife *S. B.* and her assigns, for and during the term of her natural life : and from and after her decease I give and devise the said messuage or tenement, buildings, lands, and premises unto my youngest son *William Biddulph*, his heirs and assigns for ever," &c. He then gave to his elder son *John*, the father of the lessor of the plaintiff, 1*s.*, and the same sum to others of his family ; and then desired his wife to let his son *William* have the use and enjoyment of his work-shop and tools belonging to his trade of a blacksmith ; during her life, without the payment of any rent or other consideration for the same. It appeared, that the premises in question, which were a certain dwelling-house

(a) See *Bristow v. Worde*, 2 Ves. jun. 226. and the two following cases.

with the appurtenances, were never in the possession of the testator; he having only the reversion in fee, expectant upon the death of the widow of his brother old *William Biddulph*, who survived him, and died lately. A verdict was taken for the lessor of the plaintiff, with liberty to the defendant to move to set it aside and enter a verdict for himself, if the Court should be of opinion, that under the words of the will the reversion in fee in the premises in question passed to *William Biddulph* the son. And a rule nisi having been obtained for this purpose,

Erskine, Benyon, and Peake shewed cause, and contended that as in the devise to *William Biddulph* the testator made use, not of general words of reference to what he had before given to his wife for life, but of the particular words descriptive of the property in his own possession, which he had first mentioned before the sweeping clause, he must be taken to have intended to confine the devise to that identical property, according to the maxim, that an heir at law shall not be disinherited but by express words or necessary implication. And here the intention must at least be admitted to be doubtful. And they cited *Woodden v. Osbourn*, Cro. Eliz. 674, where one having lands called *Hayes*, extending into two villis, *Cokefield* and *Cranfield*, devised all his lands in *Cokefield*, called *Hayes-lands*, to his youngest son and his heirs; and if he died without issue, his wife was to have *Hayes-lands*: it was ruled that the wife should only have the lands in *Cokefield*. And *Ewer v. Hayden*, Ib. 476, where a devise of "all a man's messuages and lands in A. and all his "other lands, meadows, and pastures" in B. was holden not to carry houses in B. In both cases the particularity of the description was considered to exclude the general operation of the words, though in themselves large enough to carry the whole property.

Leycester and Milles were to have argued in support of the rule.

LORD KENYON, C. J. This is a very plain case. The testator after giving to his wife for life certain messuages and premises, which he describes as being in his own possession, with many unnecessary words, proceeds further to give her for the same term "all other his real estate whatsoever in *Murrey* or "elsewhere, &c. or in any other place whatsoever in Great Britain." And after her decease he gives "the said messuage or tenement, buildings, lands, "and premises" to his youngest son *W. B.* in fee. It cannot be pretended, that if the reversion in these premises had fallen into possession in the lifetime of the testator's widow, she would not have been entitled to enjoy them for her life; then how can we control the generality of the words of the devise over to the son, which certainly are large enough to carry the reversion of all that the widow was entitled to for life. In *Terms de la ley*, p. 241, which is a very excellent book, it is said, in laying down rules for unlettered men to make their wills, that if one devise to *J. S.* all his lands and tenements, not only all his lands in possession pass, but all those also which he has in reversion, by virtue of the word *tenements*. Here too the word *premises*, with reference to what was before devised to the widow, would be sufficient to convey all. But it is said, that it must be confined to premises in the testator's possession, because it is connected with such restraining words in the first clause; but that would be to reject all the intermediate words to which the said *premises* have a reference, and amongst them the devise of "all other "his real estates whatsoever," &c. Though there be a particular description of property in a devise, yet if other general words are added, large enough to carry other property, they cannot be rejected; and the devise confined to the property particularly described; as was settled long ago in *Chester v. Chester*, 3 P. Wms. 55—61, and was holden more recently in *Freeman v. The Duke of Chandos*, Cowp. 360, when a remote reversion not in the contemplation of the parties passed by general words after a particular description.

LAWRENCE, J. The word *premises* in the first clause meant the several

things before mentioned ; and according to the same sense in the last clause, it comprehends all that was then before described.

Per Curiam,

Rule absolute.

Jacob v. Lindsay.

1 East, 460. May 12, 1801.

Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such acknowledgment in writing cannot be given in evidence *per se*, in respect to the cash items amounting to about 40*s.* in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove that upon calling over each article to the defendant he admitted that he had received the same; and the witness may refresh his memory by referring to the account.

THIS was an action for goods sold and delivered, money lent, paid, had and received, and upon an account stated, which was tried before *Thompson, B.* at the last *Winchester* assizes. The plaintiff, a salesman, had supplied the defendant, a seaman, with different sums of money and various goods from time to time, all which items were entered in a book. After the defendant was in custody under the arrest, the plaintiff's clerk, (who had not himself made the entries, nor knew of the delivery of the articles,) went to the defendant and examined the book with him, article by article, sometimes the defendant and sometimes the clerk calling over the several articles, money as well as goods. The defendant admitted the receipt of each article, and said it was a fair account, and he had nothing to say against the charges. This book was put into the witness's hand at the trial, and he swore to the defendant's acknowledgment of each item separately in the manner stated. Upon production of the book it appeared that the items were entered in four different pages, and that cash constituted one or more of the items in each page, to each of which the defendant's name was subscribed, sometimes at the bottom, sometimes in the middle of the pages. On the first page the defendant had written, "Received the contents above by me, *James Lindsay*;" on the second, "Received the contents, *James Lindsay*;" on the third the same; and on the fourth, "Received, *Jas. Lindsay*." Whereupon it was contended on the part of the defendant, that for want of the pages being stamped where the cash items amounting to 40*s.* the evidence of the defendant's having admitted each article on its being called over could not be received so far as it went to charge the defendant with cash supplied him by the plaintiff. The benefit of this objection was reserved by the learned judge, and a verdict was found for the plaintiff for 12*6*l.* 17*s.* 6*d.** the balance of the whole account, subject to the reduction of 53*l.* 17*s.*, the amount of the cash items, if the court should be of opinion that the evidence was insufficient for want of stamps on the receipts. A rule *nisi* having been accordingly obtained for reducing the damages,

Dallas and *Jekyll* shewed cause. The book was not offered as evidence *per se* of the defendant's acknowledgment of the receipt of the money in writing; but the fact of his having received it was proved by the witness out of the defendant's own mouth, and the book was merely referred to in order to refresh the witness's memory of the several items which were so admitted. Neither was the admission made in general terms with reference to what was contained in such an account, which might have required explanation by the account itself; but this was a verbal admission by the defendant of each particular article read over to him at the time, to which the witness could depose of his own knowledge by refreshing his memory. The circumstance, therefore, of the defendant's signature was altogether immaterial.

Dampier and *Sturges*, contra. The admission was made with reference to the several articles contained in the account which was read over by or to the

defendant at the time. The book, therefore, was the best evidence of the particular items so admitted, and was necessary to be produced. Then, if necessary to produce the writing, which amounted in point of law to a receipt, it ought to have been stamped, and could not be supplied by parol evidence; because that was not the best evidence of which the nature of the thing, having been reduced to writing, was capable. The signature of the defendant made the account the best evidence of what he had received. The entries were not made by the witness himself, and therefore not like the common case where a witness, who has once had a distinct knowledge of the fact of the delivery of goods without reference to any account, is permitted afterwards to refresh his memory by entries made at the time.

LORD KENYON, C. J. If this book had been tendered in evidence with the defendant's signature thereto as a receipt, or if his admission had had reference to the account so signed, certainly it could not have been given in evidence, and no parol evidence could have been received of the contents of the writing. But the objection taken does not apply to the case. For long after this receipt or acknowledgment in writing the defendant was asked by the witness whether he had had such and such articles of the plaintiff, and he acknowledged that he had: there is no doubt therefore that this was evidence to go to the jury of his having been furnished with those identical articles.

GROSE, J. The evidence was not offered as evidence of a receipt, but the evidence was of a verbal admission by the defendant of his having had certain articles and sums of money from the plaintiff, proves, not by the signature to the account, but by the testimony of the witness to whom he made the admission.

LAWRENCE, J. The book certainly could not be received in evidence as a receipt for the money by the defendant, for want of a stamp. In itself indeed the book having been kept by the plaintiff was no evidence at all against the defendant to charge him with the items of the account; but if there had been no signature added, it cannot be pretended but that if the witness had made use of it to ask the defendant whether he had had such and such articles contained in it, his admission would have been evidence against him; and the witness might afterwards have refreshed his memory at the trial by referring to the particular items to which such admission extended. Then if this use might have been made of the book without the signature, the defendant by putting his name to it cannot make it less evidence for the purpose for which it was produced.

LE BLANC, J. The objection amounts to this, that there can be no verbal admission by a party of his having been furnished with certain articles in an account to which he had affixed his signature; but that cannot be supported.

Rule discharged(1).

Ormerod v. Tate.

1 East, 464. May 13, 1801.

An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment: and if after notice to the defendant, the latter pay it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself, and he will not be prejudiced by a collusive release from the plaintiff to the defendant.

THIS cause being at issue at York Spring Assizes 1800, the parties entered into bonds to refer it to arbitration, and the arbitrator awarded the de-

(1) Vide *Doe v. Perkins*, 3 Term Rep. 749. and *Tanner v. Taylor* therein cited, p. 754. 6 East 420. in notis. *Burrough v. Martin*, 2 Campb. 112.

fendant to pay to the plaintiff 26*l.* by two instalments, 10*l.* on the 24th of May 1800, and the remaining 16*l.* on a certain future day. On the 16th of May, the plaintiff's attorney, having been informed that the parties intended to settle the matter between themselves for the purpose of ousting him of his lien on the costs, served the defendant with notice to pay the amount of the damages and costs to him, and not to settle the same with the plaintiff or any other person, as he had a lien upon the costs for his fees, &c. notwithstanding which the defendant on demand of the first instalment by the plaintiff's attorney, when it became due, refused to pay it to him, but paid it over to the plaintiff himself, and obtained from him a receipt in full of all demands: and then told the attorney he would never pay him a shilling, and he might get his costs how he could. Thereupon a rule was obtained on the part of the plaintiff's attorney, calling on the defendant to shew cause why he should not pay him his costs in this cause out of the money awarded to be paid by the said defendant to the plaintiff, and also the costs of this application.

Gibbs shewed cause against the rule, and contended that the attorney's lien was confined to the cases of money recovered by the judgment of the Court, and did not extend to money awarded; and the rule being introduced merely for the sake of the officers of the court, in derogation of the natural rights of the parties to settle their own disputes without the intervention of a third person, it ought not to be extended farther than it had gone. That at any rate, it was competent to a plaintiff to release the whole or any part of the damages, though it might not be permitted to the defendant to pay the money over to the plaintiff after notice from his attorney of his lien.

The Attorney-General and *Yates*, contra, relied upon the general practice as settled in *Welsh v. Hole*, Doug. 238, *Read v. Duppa*, 6 Term Rep. 361, and *Rand v. Fuller*, Ib. 456, and said, that this was in effect the same case; there being a cause in court, and the damages only ascertained by an arbitrator instead of by a jury. And as to the pretended receipt in full or release, it was a mere juggle between the parties to cheat the attorney of his lien.

Lord KENYON, C. J. The convenience, good sense, and justice of the thing require that an attorney should have the same lien on damages awarded as if they were recovered by the judgment of the Court in the ordinary course of the cause. The public have an interest that it should be so; for otherwise no attorney will be forward to advise a reference. As to the right of the plaintiff to release any part of the damages, it is out of the question here; for this appears to be no other than a mere shuffle between the plaintiff and defendant to cheat the attorney of his lien. Therefore,

Per Curiam, Rule absolute for the defendant forthwith to pay over to the plaintiff's attorney 10*l.* the amount of the first instalment awarded to be paid to the plaintiff, and to pay the remaining instalment when due to the plaintiff's attorney (1).

Ex parte Robert Softly.

1 East, 466. May 16, 1801.

A keelman employed in navigating down the river Tyne to the port of Shields at the mouth of that river, is liable to be impressed; and cannot afterwards bring himself within the protection of the 18 Geo. 2. c. 17 s. 2, exempting every person, not having before used the sea, who shall bind himself apprentice to serve at sea, from being impressed for three years from such binding.

THIS came on upon a rule calling upon the commanding officer of his Majesty's hired tender the *Edwinstowe*, to shew cause why a writ of *habeas*

(1) [See the remarks of C. J. Gibson, approving of this case, in *Foster v. Jack*, 4 Watts, 340.—W.]

corpus should not issue to him to bring up the body of *Robert Softly*, who was in his custody in consequence of having been impressed. The rule was grounded on several affidavits, stating that on the 6th of May 1800, *R. Softly*, a keelman, was bound apprentice to *T. S.* for three years from that time, to learn the business of a mariner or seaman; and that on the 12th of the said May, the Lords Commissioners of the Admiralty granted *Softly* a protection on the said indenture for the same period. That on the 9th of January last, he was impressed on board of his master's ship in the river *Tyne*. That he had never served at sea, or been bound before to any other person to serve at sea. That the employment of a keelman on the river *Tyne* consists in receiving coals into certain vessels called keels at the coal wharfs on the banks of the river, and navigating such keels to the port of *Shields* or other parts of the river, and there putting the coals on board ships for exportation. That such employment does not render it necessary, nor do the men in performing it to go out to sea, but are wholly employed on the river.

The affidavits on the part of the Crown set out the order of Council of the 3d of December 1800, whereby his Majesty, by the advice of his Privy Council, upon the urgency of the naval service, ordered the Lords Commissioners of the Admiralty to issue warrants for pressing so many "*seamen, seafaring men, and others, whose occupations and callings are to work in vessels and boats upon rivers*," as should be sufficient to man his Majesty's ships," &c. and stated further, that *Softly* had been employed in keels navigating the river *Tyne* since he was ten years of age, and has continued for the last five years in the same employ as a man. That on 22d of December 1799, he was bound to *J. H.* coal-fitter at *Newcastle* for a twelvemonth; that he continued employed in a keel till May 1800, when he deserted his master's service and went to *Sunderland*, where he was bound with two others under the like circumstances, to his present master *T. S.* That the keels employed on the *Tyne* are of about 21 tons burthen, and usually navigated by four persons, the skipper, two men, and a boy. That the chief employment of the keels is to carry coals from the staiths (or wharves) to the ships in *Shields* harbour, the nearest staith to which harbour is about a mile, and the furthest about 18 miles up the river *Tyne*. That the keels are navigated with one, and sometimes two masts, and large lug sails, and sometimes with-studding sails and two oars, and steered with a rudder and tiller. That the sea at and near *Shields* harbour frequently runs high, and it requires great skill in the steering and management of a vessel to navigate the keels; particularly in tempestuous weather, when the keels are often driven to near the mouth of the river, and sometimes to sea. That the generality of keelmen are very expert in the trimming of their sails and handling their oars and rudder; and steer with great facility and precision in narrow and intricate channels, and particularly in getting along side of vessels when the wind blows high; and that they occasionally assist ships in the river, and help to work and rig them. That the branch pilots of the *Tyne* are selected from this description of persons. It was also sworn by several persons conversant with the impress service, that this description of persons were often impressed.

The Attorney General and *Jervis* shewed cause against the rule, and contended that the protection granted to *Softly* was not valid under the stat. 13 Geo. 2. c. 17. by virtue of which it was claimed. That is entitled "An act for the increase of mariners and seamen to navigate trading ships or vessels." By the 1st section a general protection is given, amongst others, to persons under 18 years of age, which does not apply to the present party; then s. 2., under which the exemption is claimed, enacts, that, "for the encouragement of able bodied *landmen* to betake themselves to the sea service, every person of whatever age, who shall use the sea, shall be exempted from being impressed for two years from the time of his first going to sea; and that every person not having before used the sea, who shall bind himself appren-

"*tice to serve at sea*, shall be exempted from being impressed for 3 years," &c. and by s. 3. persons so exempted shall have protections from the Admiralty. The validity, therefore, of the protection depends on the construction of the clause granting the exemption. Now the act which was for the *increase* of mariners, by giving protections to persons upon their entrance into the sea service, does not extend to such as were liable to be impressed before they entered into that service, in respect of which the exemption is claimed; for such persons do not come within the reason of the exemption. The binding of one as an apprentice to the sea service, who was before that time in a class of persons liable to be impressed as mariners, would not operate to the increase of mariners, but would rather reduce the number of persons disposable at the public service. The right of pressing mariners for the navy is, says Mr. Justice *Foster*, *Fost. Cr. Law*, 159, a prerogative inherent in the crown, grounded upon the common law; and recognized by many acts of parliament. Amongst the latter he refers^(a) to the act of the 2 and 3 Ph. & M. c. 16, which lays a penalty on *watermen* plying between *Gravesend* and *Windsor*, for withdrawing themselves in the time of pressing commission for the service of the crown upon the sea. Upon which he observes, that though it extends only to watermen on the *Thames*, yet it supposes the legality of such commissions, and that these people were the objects of them. *A fortiori*, therefore, persons of the description of these keelmen, who though not used to go to sea, are employed in a laborious and sometimes dangerous navigation, which requires great skill and hardihood, in a large navigable river like the *Tyne*, must be liable to be impressed. Such persons come expressly within the words and meaning of the order of council on which the press-warrants are framed, which include not only *seamen*, and *seafaring men*, expressly so called, but "*others whose occupations and callings are to work in vessels and boats upon rivers.*" That the legislature in the 13 Geo. 2. c. 17, had the protection of *landmen* principally in view, who had never before been subject to be impressed, may also be collected from other statutes passed *in pari materia*, viz. 7 & 8 W. 3. c. 21. s. 15. which enables the Admiralty to give protections for two years to "*landmen desirous to apply themselves to the sea service.*" 2 & 3 Ann. c. 16. s. 4. 5. and 15. protects poor boys bound by parish officers to sea in the merchant service till 18 years of age; and also, for three years, all such as shall voluntarily bind themselves. Then the stat. 4 & 5 Ann. c. 19, reciting that the last-mentioned act was *intended for the encouragement of landmen* to bind themselves apprentices to the sea service, and that the exemption had been abused by protecting *seamen* who had so bound themselves, enacts and declares, that no person of the age of 18 years shall be exempted from being impressed *who shall have been in any sea service before the time they bound themselves*, &c. It appears also from the statutes, that the term *landman* is used in contradistinction to *seaman*, and that all persons are considered as seamen who are liable to be impressed for the *sea service*.

Park, contra, admitted that the party was within the description of those who were liable to be impressed by the order of council: but contended that he was exempted by the special provision of the stat. 13 Geo. 2. c. 17. s. 2, which exempts all persons, *not having before used the sea*, who shall bind themselves apprentices to serve at sea. Now here the fact was positively sworn, that *Softly* "*had never served at sea, or been bound before to any other person to serve at sea.*" By using the sea must be understood navigating upon the *open sea*. None of the acts referred to carry the argument further, because they all use the same description. And considering that they were all passed for the purpose of encouraging persons to embark in this mode of life, which is a nursery for the navy, under the faith of

(a) *Ib.* p. 171. and vide stat. 4 & 5 Ann. c. 19. s. 18.

being protected from being impressed for a certain period, the words ought to be construed in their plain and popular sense, adapted to the understanding of that description of men to whom they apply.

LORD KENYON, C. J. This case in its consequences is of infinite importance to the public, since the existence of the country depends upon its fleets. I have frequent applications made to me as Chief Justice, out of court, for discharging persons who have been improperly impressed: a power which, as Lord *Mansfield* said, had been exercised by Lord C. J. *Holt*, and long before his time: but I have never considered myself at liberty to discharge persons of this description. The power of pressing persons for the sea service is not general; it goes as far only as the safety of the country requires that it should, and there it stops. It extends to persons whose employment is upon the sea and in navigable rivers. There can be no question, but that persons employed like this man upon the river *Tyne* are liable to be impressed. The only question then is, Whether he is protected under the act of the 13 Geo. 2? I think not. That act was passed for the encouragement of landmen, persons not before used to a sea life, to follow the sea; for which purpose it gives them a protection from being impressed for a certain period. But it is said, that this man did not before this time *use the sea*, and therefore that he comes within the exemption, though liable before to be impressed: but that construction would decrease the number of mariners disposable at the service of the state, instead of increase them as the object of the act purports to do. Besides, if it were necessary, I am not sure that the mouth of such a river as the *Tyne* is not in a general sense to be called the sea. Navigable rivers below the bridges where the sea ebbs and flows are called *Æstuaria maris*(a). The rivers *Severn*, *Mersey*, and *Dee*, have outlets of the same description. The lower part of the *Severn*, which takes the name of the *Bristol Channel*, is no doubt the sea; and the outlets of the *Mersey* and *Dee*, which are called the estuaries of those rivers, are so likewise. It is clear, however, that the persons employed in this sort of navigation are not those inexperienced landmen whom the legislature, in order to encourage them to enter upon this mode of life, meant to protect for a time; for the keelmen are for the most part able and expert navigators; and an officer well acquainted with those parts, who joins in the affidavits, says he should prefer as a seaman a person of the age of 21, bred to the keels, to one who had been two voyages to the *East Indies*. This person it appears is of that age; and it is most obvious that he has bound himself apprentice, not for the purpose of learning his business, but in order to protect himself from being impressed. And I think we should be dealing away the security of the country, if we were to hold that the protection of the act extended to persons of this description binding themselves apprentices.

GROSE, J. The only question is, Whether this party is protected by the act of parliament; that is, whether before he became bound he could be said not to have *used the sea*? The answer in the affirmative to the question which I put during the argument, namely, whether this person before he was bound was liable to be impressed, in my judgment decides the case; for the express object of the act was to increase the number of mariners for the sake of the public service, and therefore to hold out an encouragement to landmen, who were not before liable to that service, to enter upon that mode of life. Whereas the construction now contended for would decrease the number of disposable mariners, by allowing protections to those who were before subject to be impressed. Therefore, though the words used are very general, yet they must be construed according to the obvious meaning of the legislature, and according to the usage which has always prevailed in respect to that class of men

(a) Vide 4 Inst. 189, 141. 2 Hale, 16, 54. Hale de jura maris, 12, 35, 46, 7.

who are said to *use the sea* ; in that sense persons not used to the sea are to be understood of landmen who were not before liable to be impressed.

LAWRENCE, J. I entertain some doubt whether this man does not come within the words of exemption of the act, exempting every person, not having before *used the sea*, who shall bind himself apprentice to serve at sea. And my doubt arises on this, that there are other descriptions of persons liable to be impressed, who yet do not *use the sea* ; such as persons employed on navigable rivers, who are described in the order of council, without reference to their being so employed within the flux and reflux of the sea in such rivers : of this description are many persons employed in navigating upon the *Thames*, at various places between *London* and *Oxford*, who certainly cannot be said to have used the sea : and therefore, as the legislature, in describing the persons intended to be exempted, have used a term not co-extensive with the power of impressing ; my doubt is, how far we are warranted in saying, that they only meant by these words to describe persons not before liable to be impressed. At the same time, it must be admitted, that the introductory part of the clause goes to shew that this person is not entitled to be exempted ; for the exemption is said to be given for the encouragement of able bodied *landmen* to betake themselves to the sea service : and the object of the act being to increase the number of mariners and seamen, seems also to favour such a construction as will not deprive the country of its right to avail itself of the assistance of any description of persons necessary for its safety, and who were before liable to be impressed. But certainly there is a difficulty in putting so large a construction on the enacting words of the clause giving the exemption.

LE BLANC, J. The legislature at the time of passing the act of the 13 Geo. 2, seem to have had two descriptions of persons in contemplation ; the one, landmen, who required instruction in the new line of life in which they were about to engage, in order to fit them for their employment ; the other, persons having sufficient skill in navigation to fit them for the sea service, without the necessity of an apprenticeship to it ; and I consider the words, " not having " before used the sea," to have been used in contradistinction to persons requiring a certain degree of instruction to fit them for the sea service. This party therefore, from his former mode of life, not being within the latter description at the time of the binding, I do not consider as coming within the protection of the act.

Rule discharged.

Vandyck and Others v. Whitmore.

1 East, 475. May 18, 1801.

It is legal to trade with the subjects of an enemy's country by the king's licence. But if it be provided in such licence, that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond being given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods. If a licence to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient that the goods were shipped before the expiration of the time, the ship not sailing till afterwards.

THIS was an action upon two policies of insurance, both dated 17th March 1798, upon a voyage at and from *London* to *Rotterdam* or *Amsterdam*, with or without clearances, to or from a neutral port ; the one being upon 137 boxes of sugar on board of a ship called the *Jonge Hendrick Vlerland*, and on 42 boxes of sugar on board of another ship called the *Juffrow Lydia* ; the other on goods on board the said ship *Juffrow Lydia*, declared to be 11 casks of sugar, valued at 330*l.*, a quantity of coffee valued at 373*5*l.**, and on 30 casks of tobacco, valued at 1380*l.* The defendant subscribed each of these policies

for 300*l.* at a premium of six guineas per cent. The declaration contained counts upon each policy for a total loss by capture, and a count for money had and received. The defendant pleaded *non assumpsit*, and paid 23*l.* 12*s.* 6*d.* into court upon the count for money had and received. At the trial before Lord *Kenyon*, C. J., at the sittings at *Guildhall* after last *Michaelmas* term, the jury found a verdict for the plaintiffs for 346*l.* 17*s.* 6*d.* subject to the opinion of this court on the following case. The ships *Vlerland* and *Lydia* were *Prussian* ships. On the 20th of *December* 1797, the *Lidia* being then bound upon a voyage to *Calais*, and the plaintiffs intending to ship goods on board her for that port, obtained for that purpose an order of council. This order was dated 20th *December* 1797, and reciting a petition of the plaintiffs to export from *London* to *Calais* 100 hogsheads of tobacco, &c. in the *Prussian* ship *Juffrow Lydia*, granted permission to send supply and deliver the same in the said vessel, being neutral, from *London* to *Calais* or elsewhere, as circumstances might require, for the use of any persons for whom the same were prohibited by the stat. 34 Geo. 3. c. 9, to be sent without such licence. With a proviso, that nothing therein contained should extend to affect the provisions in any act of parliament, except the said act; or to licence any act to be done further or otherwise than by the said act the king was authorised to licence. Provided also, that if any question should arise whether any thing done was authorised by that order, proof that such thing was done under the circumstances, and according to the terms and conditions therein expressed, should be on the persons claiming the benefit thereof. Provided also, that the said licence should remain in force for two months from the date, and no longer. The plaintiffs, in consequence of this licence, shipped 30 hogsheads of tobacco on board the last mentioned ship, which formed part of the goods insured by one of the policies in question; and on the 23d of *December* 1797, entered the same at the custom house for *Calais*; and upon such entry the shipping clerk of the plaintiff made the following oath: "*Edward Ray*, for *Vandyck* and "*Gevers*, maketh oath that the goods mentioned in this certificate are now to "be exported to *Calais* on their own account. *E. Ray*." The plaintiffs at the same time entered into a bond according to the provisions of the stat. 29. Geo. 3. c. 68, in the penal sum of 1520*l.* conditioned to land the tobacco at *Calais*, &c. The remainder of the goods insured by the policies in question were afterwards shipped by the plaintiffs for *Rotterdam*, under an order of council of 10th *January* 1798 (after mentioned). On the 7th of *April* 1798, the captain of the *Juffrow Lydia* cleared out his ship at the custom house in *London* for *Calais*, *Rotterdam*, and *Embden*, having made oath to the truth of the clearance in the usual form; and on the 14th of the same month, sailed from *London* direct for *Rotterdam*. The *Juffrow Lydia*, when she so sailed from *London*, had on board the said 42 boxes and 11 casks of sugar, the said quantities of coffee, and the said 30 casks or hogsheads of tobacco; and the *Vlerland* the 137 boxes of sugar; all on account of the plaintiffs. The *Vlerland* arrived safe at *Rotterdam*; but the *Lydia* with the sugar, coffee, and tobacco on board, having arrived off the mouth of the *Maese*, and having come to an anchor there, was captured by a *French* privateer and carried into *Ostend*; whereby the 42 boxes of sugar insured by the first mentioned policy, and the 11 casks of sugar, valued at 330*l.*, the coffee, valued at 3735*l.*, and the 30 hogsheads of tobacco, valued at 1380*l.*, insured by the other policy, were respectively wholly lost to the plaintiffs. By an order of council, dated 3d *September* 1796, reciting that an act passed in the 33 Geo. 3. (c. 27.) intituled "An Act more effectually to prevent during the present war between *G. B.* and *France*, all traitorous correspondence with the enemy," &c. And another act passed in the 34 Geo. 3. (c. 9.) intituled "an Act for preventing "money or effects in the hands of his majesty's subjects, belonging to or dis- "posable by persons resident in *France*, being applied to the use of the per- "sons exercising the powers of government in *France*, and for preserving the

"property thereof for the benefit of the individual owners thereof." And that another act passed in the 34 Geo. 3. (c. 79.) intituled "An act for more effectually preserving money and effects in the hands of his majesty's subjects, belonging to or disposable by persons resident in *France*, for the benefit of the individual owners thereof." And that it was expedient that such licence and authority should be granted as was thereafter granted; his majesty, &c. granted licence, according to the authority given by the said acts, to all persons residing in *G. B.* either on the account or credit of themselves, or of any other person whomsoever, or wheresoever resident and being, to sell, supply, deliver, or send for such purpose. &c. or to aid or assist in so selling, supplying, delivering, or sending, &c. any goods or effects mentioned in the said acts (or any other goods or effects except such as are thereafter mentioned) to or for the use of any persons residing in the territories of the *United Provinces*, or in the *Austrian Netherlands*, or in any part of *Italy*, or for the purpose of being sent into any part or place within the same respectively. *Provided*, that all such goods, &c. be exported from this kingdom in ships and vessels belonging to persons of some state or country in amity with his majesty; and that such exportation be made *under the usual conditions and regulations*; and that such security be given *by bond*, in such penalty, by such persons, and in such manner, as shall be directed by the commissioners of his majesty's customs, that the said goods, &c. shall be exported to the places proposed and to none other, and that a *certificate* shall be produced within six months from the date of the bond, under the hand of the *British* consul or vice-consul (or two *British* merchants, &c.) residing at the place at which such goods, &c. shall be landed; testifying that the said goods have been all duly landed at that place. *Provided* also, that nothing therein contained should be construed to licence the exportation, &c. of any arms, or naval or military stores, &c. or any articles which are especially prohibited by any act of parliament, other than the acts before mentioned to be exported, &c. or in any manner to affect the provisions of any other act of parliament; or to licence or authorize the several acts, matters, and things aforesaid, further or otherwise than as the same might be affected by the several before mentioned acts of parliament. *Provided* also, that every person who should take the benefit of that licence, should take it upon condition, that if any question should arise, whether the thing done were authorized by the licence thereby given; the proof that such thing was done under the circumstances, and according to the terms and conditions of that order, should lie on the persons claiming the benefit thereof. And that licence was directed to remain in force until the 25th of *December* then next ensuing, &c. The above order of council was by several other orders, particularly by one of the 10th of *January* 1798, further continued to the 25th of *June* 1798, which was subsequent to the loss in question. The question for the opinion of the court was, Whether the plaintiffs were entitled to recover.

This case was first argued in *Michaelmas* term last, by *Giles* for the plaintiffs, and *Carr* for the defendant, and again in *Hilary* term, by *Gibbs* for the plaintiffs, and *Rous* for the defendant.

The objections made on the part of the defendant were, first, (which went to the whole cause of action,) that the shipment of the goods for *Rotterdam* was illegal at common law, as being a trading with an enemy, and consequently could not be protected by an insurance; according to *Potts v. Bell*, 8 Term Rep. 549, and the case of the ship *Hoop*, Rob. Adm. Rep. 196, which latter case also shews, that the circumstance of the goods being shipped on board a neutral vessel makes no difference; and that such trading was not legalized by the order of the king in council of the 3d of *September* 1796, continued by that of the 10th of *January* 1798. The original order refers to three recent acts of parliament, the 23 Geo. 3, c. 27., 34 Geo. 3, c. 9, and 34 Geo. 3, c. 79., the operation of which it suspends in favour of the plaintiffs. The only

effect of it, therefore, was to licence the trading so far as it had been specially prohibited under certain penalties by those particular statutes, leaving the question as it was at common law, or regulated by any other statutes: and indeed the order itself specially provides, that it shall not affect the provisions of any other than those acts of parliament. But supposing the licence to operate also upon the common law, it was done away by the subsequent stat. of the 38 Geo. 3, c. 28, by which the prohibitions of the former acts against such trading were extended to the *United Provinces*, and all intercourse with them was expressly prohibited. That act took effect on the 12th April 1798, after which, namely, on the 14th, the ship sailed from *London* for *Rotterdam*. And though there is a saving clause (s. 5,) as to acts which *shall be* done under the king's licence; yet the operation of it is prospective as to licences afterwards to be granted, and cannot warrant a licence granted before, which had not been carried into execution; in the same manner as a similar clause in the former acts had necessarily only a prospective operation. At all events, however, if the former licence continued in force subsequent to the last mentioned act, the plaintiffs cannot avail themselves of it without shewing that they have complied with all the terms and conditions of it. This is not only required by the licence itself, but enforced by the stat. 34 Geo. 3, c. 79, s. 30. Now the order of council stipulates, that the goods shall be exported *under the usual conditions and regulations*; one of which is, (as required by the stat. 13 & 14 Car. 2. c. 11, s. 3,) that the goods shall be entered for the real place of destination: but that has not been complied with here. Such a regulation is peculiarly necessary to be observed, because it furnishes the means of providing for the observance of another condition mentioned in the order of council, namely, that the shippers shall give bond to export the goods to the place proposed, and to none other; a compliance with which is required to be proved by a certain certificate from such place. But no such bond was given in this instance, the proof of which lay upon the plaintiffs; and without it the goods were liable to seizure and confiscation. If, then, the shippers of goods do or omit an act which would give rise to a rightful detention or confiscation, they cannot recover upon a policy of insurance to protect the property so illegally exported. Secondly, (which relates only to the tobacco,) the stat. 29 Geo. 3, c. 68, for raising a duty on tobacco, and preventing evasions of it, in addition to the requisition of the stat. 13 & 14 Car. 2, above-mentioned, requires (s. 40,) that a bond shall be given by the shipper for the actual exportation of the article to the place specified in the bond; "and that such tobacco shall not be exported to any other place or country whatever," &c. and s. 49, provides a particular method for the discharge of bonds so taken, by a certain certificate of the compliance with that requisition. By the first mentioned clause the legislature meant to interdict the exportation altogether unless such condition were complied with, and not merely to sanction it upon terms. Here then the shipment was declared to be for *Calais*, and a bond given accordingly; notwithstanding which the ship afterwards cleared out and sailed for *Rotterdam*. But if this were permitted, all the precautions in the act would be liable to be defeated: because it could not be known whether the conditions of the bond had been complied with, or whether the goods had not been relanded again in *England* with a view to defraud the revenue. The documents therefore obtained were false, which are worse than none. And it was settled in *Farmer v. Legg*, 7 Term Rep. 186, that if a ship be not properly documented the owner cannot recover upon an insurance against the loss of it. It is true, that this is a mere revenue law; and it has been said in *Planche v. Fletcher*, Doug. 250, that we are not bound to regard the revenue laws of another state: but that implies that we are bound to regard our own, and an act done in contravention of them is illegal, and has been holden to avoid an insurance: *Johnson v. Sutton*, Ib. 254, and *Dalmada v. Motteaux*, Park's Insur. 266, 1st edit., and in cause of seizure, 2 Roll. Rep.

79. No advantage can be taken of the licence to ship to *Calais* or *elsewhere*, because that had expired in point of time long before the ship cleared out.

For the plaintiffs it was answered, as to the general question, that it could not be doubted but that the king's licence extended to legalize the trading as well at common law as under the recited acts. The king had power at common law to legalize such a trade, and those acts continue to him the same power notwithstanding their prohibitory provisions: the licence therefore operated under the acts with a special reference to each of them in the nature of a statute *non obstante*, and it was also valid as at common law without any special reference, by licensing the trade itself. The statute 38 Geo. 3. c. 25, does not vary the question, for the 5th section saves the king's prerogative in this respect in the same general terms that the former acts had done. The only objection then is, that a mere custom-house regulation has not been complied with, namely, the giving the bond for the exportation of the goods to the place proposed. The omission of that might perhaps have been ground of detention till it were complied with, and a good cause of refusing a clearance; but the consequence cannot be carried further, so as to make the insurance illegal. There is a great difference between performing an illegal voyage, and performing a legal voyage irregularly. In *Planche v. Fletcher*, Dougl. 250, even the circumstance of clearing out for another port than that to which the ship was really bound was holden not to make the voyage illegal, or vacate the insurance. It is often done in time of war to deceive the enemy's cruisers. And it is no answer to say that the rule there laid down only applies to attempts to evade foreign revenue laws; for there, as here, the clearance was from the port of *London* for a foreign port. Besides, another object there was to evade the light-house duties; yet Lord *Mansfield* said, that the ship was not liable to confiscation, nor the insurance void on that account. The insurance is only void where the trade itself is made illegal, or the risk is increased for want of certain ship's documents. In *Farmcr v. Legg*, 7 Term Rep. 186, the question was, Whether the captain of the ship were properly qualified under the act of the 31 Geo. 3. c. 54, requiring him to have previously served a certain time in the *African* trade; and he was subjected to a penalty in case he was not so qualified: but the Court did not hold the insurance void for the want of the certificate of such qualification, but on the ground of a breach of implied warrant by the owner, in not having employed a commander of such competent skill and experience as the legislature had deemed necessary in that trade. In *Johnson v. Sutton*, Dougl. 254, the trading itself was made illegal, and as to half the cargo there was no licence. The case of *Dalmada v. Motteaux*, Park's Ins. 266, turned on a breach of embargo, which is a temporary prohibition of the voyage itself, and subjected the ship to confiscation. In this case the trade itself was legalized by the licence; and the want of a mere custom-house document, which is not one of the ship's papers, but deposited with the custom-house officer, cannot vary the question between the assurer and assured. The only effect of it was, that till the bond was entered into the custom-house officers might have refused to let the ship clear out; but that being waived on the part of the crown, no objection can now be made by the defendant, and the Court will presume that every thing was regularly done to obtain such clearance. Secondly, with regard to the tobacco, that was also protected by a particular licence. It is sufficient that it was shipped within the time limited by the licence, though the ship did not clear out nor sail till afterwards. In this case, the bond required was given to export the tobacco to *Calais*, and the licence was to go to *Calais* or *elsewhere*. It was not necessary for the ship to proceed direct for *Calais*, but she might have proceeded there after having touched at *Rotterdam*. Between the time of giving the bond and the actual sailing of the vessel, circumstances might intervene to prevent the direct voyage from being pursued. But supposing the intention of going to *Calais* was altogether dropped, the only ef-

fect is, that the bond would be forfeited ; but no forfeiture of the goods would be thereby incurred. Much of the general reasoning before urged as to the distinction between custom-house and ship documents applies also to the tobacco act. And it is also a circumstance of great weight in this case that no fraud was intended, which might otherwise have vitiated the whole transaction, and perhaps made the trading itself illegal, as done in contravention of the law and the orders of council. But here the true destination of the ship was disclosed, and the custom-house clearance obtained with full knowledge by the officers of all the circumstances.

The Court took time to consider the case ; and on the last day of the term Lord KENYON, C. J. delivered their unanimous opinion shortly to this effect. After stating the facts of the case : The plaintiffs obtained the order of council of the 30th of *December* 1797 for the purpose of shipping the tobacco and other goods therein mentioned for *Calais*. But that licence will not affect the decision in this case ; because it was confined to the sending, supplying and delivering in the *Lydia* the goods specified within two months (that is, from the 20th of *December* 1797), and the ship did not sail till the 7th of *April* 1798. Therefore, whatever might have been the intention of proceeding to *Calais* after going to *Rotterdam*, the licence having expired before the voyage commenced, the exportation of the goods could not be protected by it. In this view of the case it becomes unnecessary for us to give any opinion upon the operation of the tobacco act. The question is then narrowed to the construction of the order of council of the 3d of *September* 1796, continued beyond the period in question by the order of the 10th of *January* 1798. But first I would observe that it is settled, and not to be doubted, that trading with an enemy's country is illegal, and that no voyage of that kind can be insured, unless legalized by the licence of the king. But though the king may at common law licence such a trading generally, yet he may also qualify his licence, in which case the party seeking to protect himself under such licence must conform to the requisitions of it. Now the order of council of the 3d of *September* licensing the trading to the *United Provinces* is on this express condition, that bond be given in such penalty, by such persons, and in such manner as the commissioners of the customs shall direct, that the goods shall be exported to the places proposed, and to no other ; and that a certificate shall be produced within six months from the *British* consul, or other persons there described, that the goods have been landed ; which condition has not been complied with, as it is not found in the case that any such bond was given. The plaintiffs, therefore, cannot protect themselves by that licence ; and consequently the voyage was illegal, and cannot be insured.

Postea to the Defendant(a).

(a) A similar determination was made in the case of *Vanbarthals v. Halbed*, M. 81 Geo. 3 B. R. One of the questions there turned on the stat. 16 Geo. 3. c. 5, which prohibited intercourse with the *American* Provinces then in rebellion ; in which there was a clause enabling the *British* commanders on that station to grant licenses to carry provisions, &c. to places occupied by the *British*. And in an action against the underwriter on a policy on goods to one of the prohibited places within the act, the plaintiff relied on a license given by one of our commanders ; but as that license did not follow the requisitions of the act, in not stating the quantity of provisions, &c. the Court, upon a motion for a new trial, held that the licence was void, and consequently the voyage being illegal was not the subject of insurance ; and finally a nonsuit was entered.

The Bishop of London v. Ffytche, in Error(a).

(B. R. Mich. 23 Geo. 3.)

1 East, 487. 1801.

Held by B. R. that the ordinary of the diocese may not refuse to admit a clerk to a rectory to which he was presented because he had given a general bond to resign upon the request of his patron: but this judgment was reversed in *Dom. Proc.*

THIS was a writ of error from the court of Common Pleas in an action of *quare impedit*, in which the defendant in error by his declaration stated, that one *Thomas Ffytche*, deceased, was seised of the advowson of the church of *Woodham Walter* in *Essex* in gross by itself, as of fee and right, and being so seised, on the 24th of *April* 1769, presented to the said church, then being vacant, *Poote Gower*, Clerk, who, on that presentation, was admitted, instituted, and inducted into the same; and that the said *T. Ffytche*, on the 10th of *February* 1777, died seised in his said estate in the said advowson, upon whose death it descended to *Elizabeth Ffytche*, then and still the wife of the defendant in error, and daughter and only child of *William Ffytche* deceased, the brother of the said *T. Ffytche*, as niece and heir at law of the said *T. Ffytche*; whereby the defendant in error and *Elizabeth* his wife, in her right, became seised of the advowson of the said church in gross; and being so seized, on the 26th of *May* 1790, the said church became vacant by the death of the said *F. Gower*, and is yet vacant; by reason whereof it belongs to the defendant in error, in right of his wife, to present a fit person to the said church; yet the plaintiff in error, the bishop of *London*, hinders him from presenting, &c. to his damage, &c. To this declaration the bishop pleaded, 1st, That the said church of *W. W.* is within his diocese of *London*, and a benefice with cure of souls; and that the said church having so become vacant by the death of *F. G.* as aforesaid, afterwards, and whilst the same continued vacant, and before the making of the presentation after mentioned, to wit, on, &c. at, &c. it was corruptly, simoniacally, and unlawfully, and against the form of the statute, agreed between the defendant in error and one *John Eyre*, that he the defendant in error should present the said *J. E.* his clerk, &c. and that the said *J. E.* should, in consideration thereof, give his bond to the defendant in error of the penal sum of 3000*l.*, conditioned at any time then after his admission, &c. upon the request of the said defendant, his heirs, &c. absolutely to resign the said rectory, so that the same might thereby become vacant, and the defendant in error, his heirs, &c. be at liberty to present anew thereto. That the defendant in error afterwards, in pursuance of the said agreement, corruptly, simoniacally, and unlawfully, and against the statute, &c. presented the said *J. E.* his clerk to the said bishop to be admitted, &c. and the said *J. Eyre*, did also, in pursuance of that agreement, afterwards corruptly, simoniacally, and unlawfully, and against the statute, &c. give such bond as aforesaid, which the de-

(a) This being a case of great importance, and to which frequent reference is made, and the grounds of the decision having been adverted to in the case of *Legh v. Lewis*, determined in the course of the term: I thought that the following note of it, which has been most obligingly communicated to me, would not be unacceptable to the profession; as I am not aware that there is any note in print of what passed in this court. The value of the original has been increased by having been compared with, and some additions made to it, from the MS. of the late Mr. Justice *Buller*, with which I have been also favoured. The latter MS. includes all the subsequent proceedings in the House of Lords, and was intended to have been added in this place: but upon comparing it with Mr. *Cunningham*'s report of the same case (in the House of Lords) in his *Law of Simony*. I found that report so full and accurate in general, that it was altogether unnecessary, for the sake of a few alterations, mostly verbal ones, to give a very long report of a case of which the profession was already in possession.

fendant in error corruptly, simoniacally, unlawfully, and against the statute, &c. accepted from the said *J. E.*; by means of which said premises, and by force of the statute, the said presentation of the said *J. E.* by the defendant so made as aforesaid became void in law; and the plaintiff in error by reason thereof did not, nor could, admit, &c. the said *John Eyre* into the said church by virtue of that presentation. Secondly, he pleads that the said church is a benefice with the cure of souls; and the same having so become vacant by the death of *F. G.* as aforesaid, afterwards, and whilst the same was so vacant, to wit, on, &c. it was, for the purpose of investing the defendant in error with an undue influence, power, and control with the said *J. E.* as rector of the said rectory, &c. in case he should, upon such presentation as after mentioned, be admitted, &c. agreed between the defendant in error and the said *J. E.*, that he the defendant should present the said *J. E.* his clerk to that church being so vacant as aforesaid, and that the said *J. E.* should, in consideration of such presentation, give such bond conditioned as aforesaid (in the manner before stated). That the defendant in error afterwards, in pursuance of that agreement, presented the said *J. E.* his clerk to the said bishop to be admitted, &c. and the said *J. E.* afterwards gave such bond, &c. with such condition, &c. which the defendant in error accepted from the said *J. E.* That upon such representation of the said *J. E.* to him the plaintiff in error for the purpose aforesaid made, the plaintiff, as ordinary of the said church, duly inquired concerning the fitness of the said *J. E.* to be by him admitted, &c. and discovered that the said *J. E.* had given such bond, &c. with such condition, &c. and that by means thereof the defendant in error would have acquired and had an undue influence, power, and control over the said *J. E.* as rector, &c. if the plaintiff in error had upon such presentation admitted, &c. the said *John Eyre*, &c. by reason of which premises the said *J. E.* became and was an unfit person to be by the plaintiff in error admitted, &c. by virtue of that presentation. Wherefore, the said bishop, as ordinary, &c. refused to admit, &c. the said *J. E.* into the said church so being vacant as aforesaid. To the first plea the defendant in error demurred generally; and also demurred to the second plea, and assigned for causes of demurrer to that plea, that there is no specification of the undue influence or power or control mentioned in that plea, with which the defendant in error was proposed to be invested over the said *John Eyre* as rector of the said rectory, to which the said defendant in error could give any answer, or upon which a proper issue could be joined to be tried by a jury. And also, that it is not in that plea alleged, how and in what manner the said *John Eyre* was or did become a person unfit to be admitted, instituted, and inducted into the said rectory and parish church, so that any issue could be taken upon such allegation of his unfitness. The bishop joined in demurrer. In *Hilary* term 1782, the court of Common Pleas gave judgment for the defendant in error upon both pleas. Upon this judgment the bishop brought a writ of error in the court of King's Bench, and assigned the common errors. In *Michaelmas* term, 1782, the case was argued by *Adam* for the plaintiff in error, and by *Lee* for the defendant.

For the plaintiff in error it was contended, that there was a distinction between this case and those which had been before the court on questions of simony; as those were between the obligor and obligee; but here the question was, Whether the bishop were bound to admit, upon such a presentation? *Lyndw.* 107. 281, proves that such bonds are unlawful. *Pascall v. Clark*, Noy. 22. They might be made the price of the living by the parson's refusing to resign; which was simony. That for compelling residence and other good purposes the law had provided suitable remedies: this therefore must be meant for bad purposes. *Sivaine v. Carter*, Comb. 394. *Grahme v. Grahme* 1 Vern. 131. That such a bond destroyed the canonical obedience of the clerk. That it turned an office for life into an office at will, which could not

be done. 4 Inst. 75. 87. 146. 3 Burn Ecc. L. 299, &c. 4 Com. Dig. tit. Officer, 239. That such bonds would be bad if taken from other officers who had life estates, such as judges, masters in Chancery, &c. That this was simony by the canon law, which the court were bound to take notice of in this case without pleading it, it having been adopted with regard to institution by the statute Articuli Cleri. c. 13.

For the defendant in error, the case of *Hasketh v. Gray*, H. 29 Geo. 2. 3 Burn's Ecc. L. 332, tit. Simony, which was in this court in 1755, was relied on, as being in point: and that the only thing the defendant's counsel there attempted to shew was, that as the defendant could not resign for want of the bishop's acceptance, the penalty was not forfeited; but the Court held otherwise. That in *Peele v. The Earl of Carlisle*, 1 Stra. 227, the point was holden too clear for argument, that such bonds were valid (a). That if the bond were void, there was no reason for the bishop not admitting; but if it were not void, his plea was, that "because the clerk had entered into a legal bond he would not admit him:" and therefore there was nothing in the distinction attempted between this case and that of the obligee. That the second plea was bad, as no issue could be taken on undue influence, as alleged in the plea.

LORD MANSFIELD, C. J. The general question before the Court upon these pleadings is the validity of such a bond: for as to the allegation, that it tended to procure an undue influence, it is certainly too general: the undue influence ought to have been specified. I think it right to declare my assent to the opinion given by the Court of Common Pleas, of which I have seen a very full note, namely, that if any undue motive appeared in giving the bond, it would avoid it at law, as well as lay a foundation in a court of equity for an injunction. And I should also be of opinion, that if after the execution of the bond an undue use were attempted to be made of it; such as a demand of money, a claim of tithe, or for any other illegal purpose, the use actually made of it should it be considered as actual evidence of the purpose for which it was given, and might be made use of in any court of law upon plea. Another circumstance mentioned in the argument is out of the case, which is, that it is simony by the canon law; for if the canon law had been pleaded ever so particularly, it would not have varied the case; for the canon law is more general than the statute. It then comes to this naked question, Is such a bond good since the statute 31 Eliz. c. 6, by the law of *England*; or is it an innocent bond on the face of it? As to that point, in the time of Eliz. and in the time of Jac. 1. such a bond was holden to be legal, and so fully established, that in 1698 Bishop *Stillingsfleet* wrote a most elaborate discourse against the decisions of the courts of common law, taking it to be fully established, but yet erroneously so. But notwithstanding the great abilities of that prelate, (and if the matter were entire there is great ingenuity in that discourse,) all the courts of *Westminster Hall* have uniformly holden it to be a lawful bond; and to such a degree, that in some of the last cases the Court would not suffer the point to be argued. I should have been very sorry to have followed that example in this case; because it would have deprived us of the pleasure of hearing both the gentlemen; but after having heard them, I think it is not permitted to us to go into the question: and if all the authorities be wrong, I am bound: I do not think it decent to go into them. And therefore upon the current of authorities, which have expressly decided the point, I think it too clear to be argued.

WILLES, J. concurred.

ASHHURST, J. I am of the same opinion. The whole tenor of the cases is so strong, that the question is established beyond controversy. I think the

(a) Vide *Johns v. Lawrence*, Cro. Jac. 248. *Babington v. Wood*, Cro. Car. 180. *Baker v. Watson*, 1 Keb. 446.

different form in which this case comes makes no difference; for what is the reason assigned by the bishop for refusing to receive the presentation? It is no more than this, because the clerk has given a bond, which the courts of law have holden to be legal.

BULLER, J. Nothing but the number of positive authorities would induce me to concur in the opinion of the Court. I cannot help thinking there was a great deal of good sense in the opinion of Mr. Justice *Powell*(a), and I think with him, that if the judges in ancient times had seen the inconveniences that have since ensued from the use of these bonds, they would not have pronounced upon them as they did. The argument would afford a great deal of discussion. The request may be for a lawful purpose, therefore the condition shall be good. If so, why not state what that purpose is? The argument seems to me equally strong, (and that part of *Stillingfleet's* book does not admit of an answer), that it may be used for a bad purpose; why not therefore bad? But upon the principles of pleading it seems a great stretch to say that it shall be taken to be confined to lawful purposes only; for the bond is to resign on request, that is, on all requests. If then the bond be to resign on all requests, can any thing be introduced on the record different from the condition? This is the way in which I should have reasoned: But so strong and so uniform a train of decisions leave no room for the Court to exercise their judgment on the reasons on which they were founded. For arguments founded on a possibility of abuse or inconvenience are not to be adopted in contradiction to what has been established as law for a century and a half past by such a variety of determinations. The rule *stare decisis* is one of the most sacred in the law; but if not adhered to in such a case as this, it would be very difficult to say that it ought to weigh in any. If the law be thought to be improper or inconvenient, application to correct it must be made elsewhere, and not to those who are bound by the repeated and solemn judgments of their predecessors(b). As to the last plea, a reason has been given at the bar, which is decisive against it: it was said that undue influence could not be defined: if it cannot be defined, it cannot be tried: it is only a consequence, and therefore cannot be traversed. Then it brings the case back to the first plea.

Lord MANSFIELD added, I forgot to make one more observation: a distinction has been made where the action is between the obligor and obligee, and this case; but there is no ground for the distinction. For in the action as between obligor and obligee, if the bond were illegal, the obligor could not recover; for no man who comes on an illegal ground can ever recover. Therefore, it is a solemn determination that the bond is legal.

Judgment affirmed.

Upon this judgment a writ of error was brought in parliament; and after hearing counsel fully at the bar, the judgment of this Court was, upon the motion of Lord *Thurlow* C. reversed. The division being 19 against 19 Lords(1).

(a) This referred to a MS. note of that Judge's opinion.

(b) Mr. Justice *Buller* delivered an opinion to the same purpose afterwards in the House of Lords. Speaking of the cases which had been decided, he said, I "have taken no small pains to find out on what principle those decisions were founded; but without much effect: for after all the labour I have bestowed upon the subject, it does seem to me that they are destitute of all sense, reason, or principle. But still they are so numerous, they have arisen at so many different periods, all the judges for near two hundred years past have been so uniformly of the same opinion, the law has been so received not only in *Westminster Hall* but through the whole kingdom as so firmly settled, and mankind have so universally acted upon that idea, that I think it would be very dangerous to overturn or even to shake it," &c.

(1) Vide 3 Bro. Parl. Ca. 211. 219. Toml. edit.

REGULA GENERALIS.

Easter 41 Geo. III.

Disposal of causes in the Peremptory Paper.

IT IS ORDERED, That no Rules in causes entered in the Peremptory Paper be enlarged during the term, or put off from the appointed day, by consent of counsel, or the attornies concerned therein, without previous application to and special leave of the Court.

CASES

IN

TRINITY TERM,

IN THE FORTY-FIRST YEAR OF THE REIGN OF GEORGE III.

Anderson, Administrator, &c. v. Martindale.

1 East, 497. June 9, 1801.

A covenant to and with *A.*, his executors, administrators, and assigns, and to and with *B.* and her assigns, to pay an annuity to *A.* his executors, &c. during *B.*'s life, is a joint covenant to *A.* and *B.* in which they have a joint legal interest, although the benefit be for *A.* only; and therefore on the death of *A.* the right of action survives to *B.*, and *A.*'s administrator cannot sue on the covenant.

IN covenant by the plaintiff as administrator of *John Anderson* deceased, the declaration, which was entitled of *Michaelmas* term generally, stated, that by indenture of four parts made the 16th of *September* 1789, between *Elizabeth Wyatt, John Anderson*, (the intestate,) *R. Mackreth*, and *J. Martindale*, (the defendant,) it was witnessed, that for the considerations therein mentioned, *R. Mackreth* for himself, his heirs, executors, &c. and the defendant as his surety, &c. did, and each of them did jointly and severally covenant to and with the said *J. A.* deceased, in his lifetime, *his executors, administrators, and assigns, and also to and with the said E. Wyatt and her assigns*, that he *Mackreth*, his executors, &c. should pay to the said *J. A.* his executors, administrators, or assigns, 60*l. per annum* during the life of *E. Wyatt*. It then averred, that the intestate died the 21st of *May*, 1799: after which, *viz.*, on the 7th of *November* 1799, administration was granted to the plaintiff; and that *although E. Wyatt is still living*, yet that *R. Mackreth* has not paid to the deceased, nor since his death to the plaintiff as administrator, the said annuity, &c., but that eight quarters were in arrear in the lifetime of the intestate, &c., and after his death two quarters more, &c., and so alleges a breach by the defendant; and concludes in the usual form with a profert of the letters of administration, *the date whereof* is the same day and year in that behalf abovementioned. To which there was a general demurrer, and joinder.

Praed, Serjt., in support of the demurrer, took two objections: 1. The declaration states, that administration was granted to the plaintiff on the 7th of *November*, 1799; and the declaration being intitled generally of *Michaelmas* term 40 Geo. 3, which refers to the first day of the term, it appears that the action was commenced before the plaintiff was qualified to sue. 2. The covenant being made with two covenantees jointly, who are to have the benefit of the same thing, namely, *J. Anderson* deceased, and *E. Wyatt*, who is stated in the declaration to be still living; the latter as survivor is alone entitled to maintain the action, and not the plaintiff as representative of the deceased

covenantee. During the lives of *J. A.* and *E. W.* the covenant was joint for the performance of one and the same thing, viz. the payment of the annuity to *J. A.* during *E. W.*'s life: there was nothing else covenanted to be done for the benefit of *E. W.* alone: and therefore, this is not like the cases where though the covenant be joint in words, yet if the interest be several the covenant shall in effect be taken to be several also: as where one covenants to *A.* and *B.* to do two things, one of them for the benefit of *A.*, and another for the benefit of *B.* Neither does it make any difference that the defendant covenants jointly and severally; for the interest being joint, the action must be of the same nature; and consequently, after the death of one of the covenantees, survives to the other, to avoid a multiplicity of actions for the same duty. And he cited *Slingsby's* case, 5 Co. 18, b. 2 Leon. 47. 3 Leon. 160, and *Rolls v. Yate*, Yelv. 177, and 2 Brownl. 207, and Bull. N. P. 157, 8, as in point. And also referred to *Cabell v. Vaughan*, 1 Ventr. 34, cited and adopted in *Scott v. Godwin*, 1 Bos. & Pull. 67, to shew that advantage might be taken in this form of the defect of title appearing on the plaintiff's own shewing.

Gibbs, contra. As to the first objection; the death of the intestate on the 7th of November is laid under a *videlicet*, and therefore the plaintiff would not be bound by it on general demurrer. [Lord *Kenyon* observed, that the letters of administration must be taken to have existed at the time to which the declaration refers, because it contains a *profert in curiam* of them.] 2dly, The whole benefit and interest passed to the intestate alone, for the annuity was payable exclusively to him; therefore, consistently with the cases cited he alone might have sued in his lifetime, and since his death his representative. This would be the case even if the covenant were taken to be joint as well as several; for the action follows the nature of the interest or benefit; and no interest or benefit passed to *E. W.* But here the covenant is several and not joint; the defendant covenants to and with *J. A.*, his executors, &c., and also to and with *E. W.* and her assigns: this is a distinct covenant to each of them, and the variance in the expression shews that it was so intended. It was useless to covenant with the executors of *E. W.*, because the annuity was to cease on her death. It is true, that this construction makes the defendant liable to two actions; but that is his own fault, for binding himself to two persons for an act to be done only to one of them. If he had so bound himself to each by two different deeds, the covenantees could not have sued jointly; then it makes no difference if there be several covenants to several persons in the same deed. But if the covenant be several, though the interest were joint, the right of action must be several.

LORD KENYON, C. J. There is no distinguishing *Slingsby's* case from the present. There *Beckwith* by indenture covenanted, promised, and agreed to and with *William Vavasor* and *Francis Slingsby*, and to and with *George Harvey* and *Frances* his wife, and their assigns, and to and with each of them (*quolibet et quolibet eorum*) that he *Beckwith*, at the sealing and delivery of the indenture, was lawfully and sole seised of a certain rectory. And in an action of covenant thereon by *Slingsby* and his wife, the issue was found for the plaintiff, and judgment obtained thereon in *B. R.*: but on a writ of error brought in the Exchequer chamber that judgment was on great deliberation reversed; because the other covenantees had not joined in the action with the plaintiffs; and they alone could not maintain the action, notwithstanding the words "*et ad et cum quolibet et quolibet eorum.*" And this distinction was taken, which appears to be very sensible, that where every of the covenantees is to have a several interest or estate, there the addition of the words "*cum quolibet eorum*" will make the covenant several, in respect of their several interests. As if one by indenture demise *Blackacre* to *A.* and *Whiteacre* to *B.* &c. and covenant with them and each of them that he is lawful owner of the said acres; there in respect of the several interests the covenant by those

words is made several. But if he demise to them the acres jointly, then those words are void; for a man by his covenant cannot, unless in respect of several interests, make it first joint, and then several by those or the like words. The learned reporter then gives several other instances, all tending to the same conclusion. And the reason given is, that where the interest is joint, if several were to bring actions for one and the same cause, the court would be in doubt for which of them to give judgment. So here I should say, here is a covenant to two to pay an annuity to one of them; shall both bring actions for the same interest where only one duty is to be paid? Which of them ought to recover for the non-performance of the covenant? The defendant is only bound to pay the annuity once. This is different, therefore, from the case put by Lord *Coke*, where the covenant is to several for the performance of several duties to each; there the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach so far as his own interest extends. It has been assumed in the argument for the plaintiff, that the covenantees had different interests, but that is not so; the covenant to both was for the same thing: and though the benefit were only to one of them, yet both had a legal interest in the performance of it; and therefore the legal interest being joint during the lives of both, on the death of one it survived to the other. If indeed the covenant had been to each by two different deeds, though for the same duty, there could not have been a joinder in action: but here the parties claim by the same title, and therefore the law coincides with the justice and convenience of the case. No difference can arise on the omission of the words *executors and administrators* in the covenant to *E. Wyatt* and her assigns, which words are added to the covenant to *J. Anderson*; the legal effect is the same: for a covenant to one and her assigns extends equally to her executors and administrators.

Per Curiam,

Judgment for the Defendant.

The Earl of Derby v. Taylor and another Executors of Twist.

1 East, 502. June 9, 1801.

A grant by lessors for lives of all their *estate, right, title, interest, &c.* in the premises to one and his *executors* habendum to him and his *executors* for 99 years if the lives should so long live, in as *large, ample, and beneficial way, &c.* as the grantors, their *heirs, &c.* held, is no assignment of the freehold, and consequently not of the *whole* interest of the grantors in their lease; and therefore the reversioners (the lives being expired within the term) cannot maintain covenant against the under lessee for not delivering up the premises in good repair.

THIS was an action for a breach of covenant, wherein the declaration stated, that the late Earl of *Derby*, whose grandson and heir the plaintiff is, being seised in fee of a messuage and other premises therein described, by indenture dated 14th *December* 1756, made between the late earl of the one part, and *Thomas Taylor* of the other part, demised to *Taylor*, his heirs and assigns, the said premises, &c. for the lives of three persons therein named, all of whom are now dead. That *Taylor* covenanted for himself, his heirs and assigns, with the late earl, his heirs and assigns, to repair and keep in repair the premises demised during the said term, and at the end of the term to deliver them up so repaired to the late earl, his heirs and assigns. The declaration further stated the entry and seisin of *Taylor* the lessee, the death of the late earl, and the descent of the reversion to the plaintiff. And that afterwards all the estate, right, title and interest, property, claim and demand whatsoever, of *T. Taylor*, of and in the demised premises with the appurtenances came to and vested in *J. Twist* by assignment; by virtue whereof

Twist entered into and became seised of the demised premises, for the remainder of the term demised to *Taylor*. The declaration further stated the death of the three persons for whose lives the estate was demised; and averred that *Twist* suffered the premises to be out of repair, and that at the end of the term they were delivered up to the plaintiff without being repaired. The defendants pleaded several pleas, but the only material one was that which denied that all the estate, right, title and interest, property, claim and demand whatsoever of *T. Taylor*, of and in the demised premises, came to and vested in *J. Twist* by assignment thereof, in manner and form as alleged in the declaration.

The cause came on to be tried at the last *Lancaster* assizes before *Graham, B.* Upon the trial the said lease was produced, which contained a proviso for re-entry if the lessee, his heirs or assigns, should demise, grant, assign, set over, or exchange the premises, or any part thereof, to or with any person or persons, other than to or for his wife and children or some of them, and that for some number of years, determinable upon the said lives, for which the premises were demised as aforesaid, or the survivor of them, without the licence of the said earl, his heirs or assigns, first obtained in writing under his or their hands. Upon the trial, all the allegations contained in the declaration were admitted to be true, except that which alleged that *Twist* became assignee of all the estate, right, title, interest, property, claim, and demand whatsoever, of *T. Taylor*, of and in the demised premises. And a verdict was found for the plaintiff by consent upon all the issues, for nominal damages, to be ascertained by a referee, if necessary; subject to the opinion of this Court, whether by means of the indenture hereinafter stated and duly executed by the parties, and the enjoyment of the premises by *Twist* during his life, he became assignee of the premises, so as to support the action. If the Court were of opinion the present action could not be supported, then judgment of nonsuit to be entered.

The indenture in question, dated 24th of *January*, 30 Geo. 2, between *T. Taylor* and *T. Harrocks* of the one part, and *James Twist* of the other part, witnessed that in consideration of 245*l.* *Taylor* and *Harrocks* hath demised, granted, bargained, sold, assigned, transferred, and set over, and by these presents doth demise, &c. to *Twist*, his executors, administrators, and assigns, all that messuage and tenement, held by lease, under *Edward* Earl of *Derby*, and now in possession of *Twist*, his assignees, &c. and all the estate, right, title, interest, good will, and tenant right, sole power of leasing or renewing leases of the said premises, property, benefit, advantage, claim, and demand whatsoever, both at law and in equity, of them the said *Taylor* and *Harrocks*, of, in, or to the same, every or any part or parcel thereof, to have and to hold the said messuage, tenement, &c. and all and singular other the premises abovementioned, and intended to be hereby assigned, with their appurtenances; unto *Twist*, his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of ninety-nine years from thence next ensuing and following, and fully to be complete and ended, if *Harrocks*, *J. Twist*, and *T. Twist*, the three lives in the indenture of lease thereof named, or any of them should so long live; and that in as large, ample and beneficial way, manner and form, to all intents, constructions and purposes, as they the said *T. Taylor* and *T. Harrocks*, their heirs, executors, or administrators, or any of them, can, may, might, or could have held and enjoyed the same if these presents had not been made; yielding and paying therefore yearly during the said term unto the lord and owner of the reversion and inheritance of the said hereby assigned premises the yearly rent of 5*s.* 6*d.*, &c. Then followed the usual covenants for quiet enjoyment, for freedom from other incumbrances than the rent, and for further assurance; executed by the proper parties.

Lambe for the plaintiff said, that after the cases of *Holford v. Hatch*,

Dougl. 183, and *Palmer v. Edwards*, (a), he must admit that the assignee was not liable in covenant unless the whole interest in the original lease passed to him: but he contended that the whole interest was assigned to the testator by the indenture, and that it was not merely an under lease. For nothing was reserved in the shape of rent or otherwise to the original lessee, but only to Lord Derby. There was no kind of tenure or holding between the assignors and assignee. As in *Poultney v. Holmes*, 1 Stra. 405, the original lessee parting with the term was holden no assignment, but only an under-lease, because he reserved rent to himself: So here the converse shews that it is an assignment. The whole deed purports to be an assignment; it is so expressed in several parts by the word *assign*. The words of grant are as extensive as possible, granting *and assigning*, "all the estate, right, title, interest," &c. of the original lessees in the premises; and though this is attempted to be restrained in the *habendum*, which is expressed to be for 99 years, if the three lives mentioned, or any of them, should so long live; yet it is apparent that the intention of the parties was to assign the whole interest; for the assignee is to hold the premises "in as large, ample, and beneficial way," &c. as the assignors, their *heirs*, &c. might have done. But if the *habendum* be no less than the premises, it is repugnant and void, and the words of grant must prevail. For the *habendum* may enlarge, but cannot abridge the premises (b), Co. Lit. 299. [Lord Kenyon, C. J. How could this conveyance operate to pass the freehold without proper words for that purpose?] It may be presumed, if necessary, that livery of seisin was made.

LORD KENYON, C. J. That is a fact which, at any rate, must be found by the jury. And I am not satisfied that there is any ground in this case upon which the jury could be directed so to find. The question at present before the Court is as to what estate passed to *Twist* under the indenture? It cannot be said that a term of 99 years is co-extensive in law with an estate of freehold; and here are no words by which the freehold of which the original lessees were seised was conveyed to the defendant's testator. Then how can we say that the whole interest in the lease passed to him. The conveyance of all the grantor's "estate, right, title, interest," &c. to a man and his executors for years cannot convey a freehold. Such words mean no more than all their interest, &c. in the legal estate thereby granted; and we cannot give those words a larger operation than the parties themselves have declared they should have.

Per Curiam,

Postea to the Defendant(c).

Wood was to have argued for the defendants.

Ward v. Felton.

1 East, 507. June 9, 1801.

A. and *B.*, merchants abroad, ship tobacco for *Liverpool*, consigned to *A.* himself there, to whose order the bills of lading are made. One of these bills is sent inclosed in a letter from the shippers to *C.* at *Liverpool* advising him of such consignment to *A.*, and that *A.* intended to proceed to *Liverpool*, but in case he should not arrive in time desiring *C.* to do the best for them. The tobacco having arrived in a damaged state before *A.* is required to be landed, and is deposited in the king's warehouse pursuant to the statute; and afterwards *C.* acting as agent for *A.*, within the knowledge of the captain makes an entry of it in his own name in the custom-house to avoid seizure. Held that this was not such an acceptance of the cargo by *C.* as would make him liable to the captain for the freight.

THIS was an action of *assumpsit* to recover the freight and primage of 72

(a) B. R. E. 23 Geo. 3. cited *Ib.* 187.

(b) That is, where some certain estate is granted by the premises, with which the *habendum* is inconsistent. *Stukeley v. Butler*, Hob. 179. 1.

(c) Vide *Smith v. Mapleback*, 1 Term Rep. 441.

hogsheads of tobacco from *Norfolk* in *Virginia* in *America* to *Liverpool*. The defendant pleaded the general issue; and at the trial, at the Sittings after *Hilary* term last at *Guildhall* before Lord *Kenyon*, a verdict was found for the plaintiff for 476*l.* 5*s.* 7*d.* subject to the opinion of this Court on the following case. In *September* 1799, the ship *Friendship*, an *American* vessel, of which the plaintiff was captain, was bound on a voyage from *Norfolk* in *Virginia* to *Liverpool* as a general freight vessel, and was consigned by her owners, to the house of Messrs. *Rathbone, Hughes, and Duncan* at *Liverpool*, as their agents. *Edward and Thomas Downing* of *Philadelphia* loaded on board her 72 hogsheads of tobacco, and the plaintiff signed the following bill of lading; the words "*Mr. Geo. Felton*," therein being struck out, and the name "*Mr. Downing*" being substituted in its place, with the consent of the shippers and of the owners and captain of the vessel: "Shipped, &c. by *E. and T. Downing* of *Petersburg* in *Virginia*, in the ship *Friendship*, *W. Ward* master, "and now lying in *Norfolk* harbour, and bound to *Liverpool*, viz. 72 hogsheads of tobacco, to be delivered, &c. at the said port of *Liverpool*, (the "damages of the seas only excepted,) unto *Mr. Downing*, or to his assigns, "he or they paying freight for the said goods six guineas per hogshead, with "5 per cent. primage. In witness, &c. Dated *Norfolk*, 25th *September* 1799." Indorsed, "The alteration in this bill of lading, substituting *Mr. Downing's* "name in lieu of *Mr. Felton's* made with consent of the parties." The bill of lading had no indorsement except the memorandum above copied. The vessel arrived safely off and near *Liverpool*, and took on board a pilot, but by bad weather was, without any fault of the crew, driven on shore, and considerably injured; and was in further danger, when the plaintiff applied to *Rathbone and Co.* his consignees, who addressed notes to several of the consignees, of goods on board her, to meet and consult what should be done; amongst others to the defendant, whose name appeared legible on the bill of lading as before stated; and they severally attended the meeting, the defendant remarking that *Downing* and *Co.* were correspondents of his. At such meeting, it was resolved by the consignees of the other part of the cargo, that *Rathbone, H., and D.* should take every precaution to save the cargo; and the defendant observed, that he did not know whether there were any goods on board consigned to him, but if there were, he agreed to the same measures. Proper means were taken by *Rathbone* and *Co.* to save the cargo. A day or two after the meeting, the defendant received an invoice of the 72 hogsheads of tobacco, and a letter from *E. and T. Downing*, containing a bill of lading similar to that before stated, except only that the name, "*Mr. Geo. Felton*," was not at all inserted in it, but the name of *Mr. Downing* only. This letter, dated *Petersburg*, *September* 25th 1799, stated that the tobacco was consigned to their *E. Downing*, who intended soon to proceed to *Liverpool* and directed an insurance on it at 40*l.* per hogshead. That in case any accident happened to *E. D.* on his passage, and that he should not arrive in time to see to the sale of the tobacco, they hoped the defendant would do the best for them. This was the first transaction, but not the first correspondence between Messrs. *Downings* and the defendant. Afterwards, on the 18th of *November* 1799, *Mr. Downing* not being arrived at *Liverpool*, the defendant made the following entry of the tobacco in the custom house, as is usually done, and as is by law required to be done before tobacco can be landed. "In the *Friendship*, "*Virginia*, *G. Felton*, 72 hogsheads, 105, 881 *lbs.* tobacco, *American* produce, to be warehoused per
 "November 19th 1799." The tobacco in question was landed from the ship on the quays at *Liverpool* by means of lighters, on the 23d, 25th, 26th, 27th, and 28th of *November* 1799, and was duly taken by the proper officers of the customs to the king's warehouse (as is the usual mode of landing tobacco at that port): but owing to the storm, and getting it on shore, some part was lost, and the rest so damaged, that only 30 out of 45 hogsheads landed in

hogsheads were serviceable; and the other 15 hogsheads, and also the remainder which was landed in bulk, were duly condemned as unserviceable, and were burnt at the king's pipe. On the 3d of *December*, after the arrival of *E. Downing* at *Liverpool*, the freight was demanded of the defendant, who refused to pay it, alleging the arrival of *E. Downing*, and that he had nothing to do with the tobacco. The 30 serviceable hogsheads were only of the value of about 5*l.* per hogshead, without any allowance for their freight. The question for the opinion of this Court was Whether the plaintiff were entitled to recover all or any, and what portion of the freight and primage of the tobacco from the defendant?

Scarlett for the plaintiff contended, 1st, that freight was due notwithstanding the deteriorated condition of the goods, owing to the perils of the sea. *Luke v. Lyde*, 2 Burr. 882, and 1 Blackst. R. 190., and *Lutwidge and How v. Grey*, Dom. Proc. 1738, there cited. In the former case Lord *Mansfield* said, "it is nothing to the master whether the goods saved are damaged or otherwise; for an average freight is due on the whole: and the merchant cannot pick and choose, but must take to the whole if he take to any." So *Molloy*, b. 2. c. 4. s. 14, says, that though all the wine leaked out, yet if there were no fault in the master, there is no reason the ship should lose her freight. Therefore, here the captain having carried the tobacco to *Liverpool* is entitled to freight upon all which was delivered. 2dly, The defendant is bound to pay the freight, he having accepted the conditional consignment made to him, and entered the tobacco at the custom-house in his own name. The commodity was consigned to him till the arrival of *E. Downing*; and there could be no other delivery of it, according to the act of parliament, than was made in this case, namely, at the king's warehouse; and the defendant shewed his acceptance of it in the only way in which he could, namely, by making the entry in his own name; he having before assented to the taking such step for the preservation of it as was necessary. Therefore, though the captain had a lien upon the commodity, and might have entered it in his own name, yet the defendant having so accepted it, and having thereby taken away the captain's lien, is bound to pay the freight, and must resort to his remedy over against the consignor.

Wigley, contra. 1st, In no event would the defendant be liable for the whole freight, but only in proportion for that part of the tobacco which was serviceable; and even as to that the freight per hogshead amounts to more than the value. Part of the cargo too was entirely lost, though it does not appear how much; and certainly no freight would be due for that, according to the cases cited. But 2dly, Even if any freight were due the defendant is not liable. He was not the consignee of the goods, but what he did was merely as agent to *E. Downing*. There was no delivery to or acceptance by him of the commodity. The lodging it in the king's warehouse was the act of the captain, in order to avoid a seizure, and by so doing he did not part with his lien. The defendant had no legal title to the goods, nor could he have brought an action for the non-delivery of them to him. The bill of lading conveyed the property to *E. Downing*, and there could be no acceptance by the defendant on his own account, and this was known to the captain. The entry at the custom-house was an act of necessity to avoid a seizure, and was done by the defendant as agent for *E. D.*; at most, it was only *prima facie* evidence of an acceptance by the defendant, which is explained by the circumstances of the case. The plaintiff is not without remedy, as he may recover whatever he is intitled to receive against the consignors.

Scarlett in reply. As between the defendant and *E. D.* the former may be considered as acting only in the capacity of an agent; but as to others he acted as owner in his own name. Every consignee is an agent in respect to his consignor; but if he accept the goods, he makes himself liable to others as owner. The letter addressed to the defendant by the consignors author-

ised him in the usual course of mercantile dealing to take to the cargo till the arrival of *E. D.*; and if *E. D.* had not arrived at all, would have authorised the defendant to sell it. Then the question must be considered as the matter stood at the time of the arrival of the cargo, which was before *E. D.* came to *England*; and the defendant having accepted it then, the right to demand the freight of him accrued at that time, and could not be devested by the subsequent arrival of *E. D.*

LORD KENYON, C. J. I do not see upon what ground the defendant can be made liable to this demand. In the first place, I am not satisfied that the captain parted with his lien upon the tobacco for his freight by the delivery of it into the king's ware-house; it was deposited there in compliance with the requisition of an act of parliament, and was still disposable according to the just claims of all parties (1). The situation of the defendant was this; he received a letter from the consignors in *America*, with whom he had had no commercial dealings before, informing him of the tobacco being consigned to *E. Downing*, to whom the bills of lading were directed, and that *E. D.* was shortly expected to arrive at *Liverpool*; but in case he did not arrive in the time to see to the sale of the commodity, desiring the defendant to do the best for them. In the mean time the ship arrived, and the damage was sustained; and it became necessary for some person to make an entry of the goods at the custom-house in order to prevent their seizure. This was done by the defendant, acting for the benefit of *E. D.*, to whom and not to the defendant the bills of lading signed by the captain were addressed. And now in consequence of the defendant's having thus interposed his good offices to preserve the goods from seizure, he is called upon by the captain to pay freight to the amount of more than the goods are worth. There is no pretence for such a demand. The goods were consigned to *E. D.*; the defendant had no interest in them; there was no contract either express or implied between the plaintiff and him, that he should pay the freight; and it is very singular that the plaintiff should have elected to have brought his action against the defendant rather than against the shippers of the goods from whom he could doubtless recover.

GROSS, J. To render the defendant liable there must be a contract either express or implied between him and the plaintiff for the payment of the freight. The former is not pretended; and how can such a contract be implied when the goods were not even consigned to the defendant. For his name which was originally inserted in one of the bills of lading was struck out, and the name of *E. Downing* inserted instead, with the knowledge of the plaintiff himself. Then it is said, that the defendant made an entry of the goods at the custom-house in his own name. But that is explained by the letter from the consignors, in which he is desired to do the best for them in case *E. D.* to whom the goods were consigned did not arrive in time. What he did, therefore, was as agent for *E. D.* one of the shippers to whom the goods were consigned: but he himself had neither *jus in re* nor *ad rem*, and can in no respect be chargeable for the freight.

LAWRENCE, J. The captain would not have done his duty if he had delivered the tobacco to any but the consignors, or their consignee, or his assigns. Now the defendant did not stand in any of these relations: he was only in possession of a bill of lading to deliver the goods to *E. D.* or his assigns, not indorsed by him; and also a private letter of advice from the shippers, requesting that if *E. D.* did not arrive in time the defendant would do the best for them. The captain then knew that the defendant in whatever he did acted only as agent for *E. D.*; and if the captain did not like to trust *E. D.*

(1) [If, by the regulations of the revenue, the master is bound to enter the goods, he may enter them in his own name, and thus preserve his lien. See *Abbott on Shipping*, 276. See also, *Milward v. Hallet*, 2 Caines, 77.—W.]

for the amount of the freight, he should either have entered the tobacco in his own name, or at least have given notice to the defendant that he would not part with his lien without the pledge of his security for *E. D.* But knowing the character in which the defendant interfered, this is an unconscientious attempt to convert his act into an acceptance of the goods on his own account.

LE BLANC, J. I consider the defendant as having acted merely as the agent of *E. D.*, and therefore that any delivery by the captain to the defendant was a delivery to him as such agent on account of his principal; therefore *E. D.* himself is the person liable to the captain for the freight. The precise time of *E. D.*'s arrival is not stated, but the only act of the defendant pretended by the plaintiff to amount to an acceptance of the goods is the making of the entry, which he knew at the time was done on behalf of *E. D.* as his agent. The captain was not bound to have parted with the goods till his lien was satisfied; but because he did not think it worth his while to keep them, it is no reason for calling on the defendant for payment of the freight.
Postea to the defendant(1).

Inglis and Others, Assignees of Crane, a Bankrupt, v. Usherwood.

1 East, 515. June 9, 1801.

A delivery by the consignor of goods on board a ship chartered by the consignee is a delivery to him, and the consignor cannot afterwards stop them in transitu. But where the delivery was made on board such a ship in *Russia*, and by a law of that country the owner of goods in case of the bankruptcy of the vendee may sue out process to retake his goods on board a ship, &c. and retain them till payment; and the owners hearing of the insolvency of the vendee, applied to the captain on board of whose ship the goods had been delivered to sign the bills of lading to their order, which he complied with, without the necessity of suing out process; held that this was a substantial compliance with such law, and that the captain on his arrival here was bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee who had become bankrupt.

IN trover for certain bar iron, hemp, and deals, tried before Lord *Kenyon*, C. J. at *Guildhall* at the sittings after *Hilary* term, a verdict was entered for the plaintiffs subject to the opinion of this Court, on the following case.

On the 13th of *September* 1798, *Crane* entered into an agreement for a charter-party of that date with the defendant at *London*, whereby the latter, as captain of the ship *William*, agreed to sail to *St. Petersburg*, and there load from the factors of *Crane* a complete cargo of stowage goods with iron for ballast, and deliver the same at *London* at a certain freight per ton; one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in three months following, under a penalty of 1000*l.* for non-performance of the agreement. The captain was to sign bills of lading for this cargo, and to address to Messrs. *Bohtlingk* and Co, at *St. Petersburg*. On the 15th of *September*, the ship sailed from *London*; and on that day, *Crane* sent by the defendant a letter addressed to *Bohtlingk* and Co., wherein he informed them, "the bearer is Capt. *Usherwood* of the *William*, whom I have chartered and sent out to your address, and by whom you will please to load 40 "tons of hemp, 60 tons of iron," &c. "which goods you will please to purchase on my account, and for the amount of the same your drafts on me "shall have accustomed honour," &c. Signed *C. T. Crane*. In another letter of the 18th *September*, *Crane* wrote to the same persons; "let Capt. *Ush-*

(1) But where by the terms of the bill of lading, the goods were to be delivered to certain persons, or their assigns, he or they paying freight for the same, the assignee of the bill of lading, who demanded and took the goods from the master, was held liable for the freight. *Cock v. Taylor & al.*, 13 East 399.

"*erwood* have a few tons more of hemp on my account, if he want it to fill "up;" and "if Messrs C. and Co. have no hemp, &c. to ship, you will then "please to let off the freight for a like quantity of stowage goods in order to "fill the vessel." And again, "the amount of these goods is to be drawn for "a month after shipping, deducting therefrom the amount of my consign- "ments." &c. The letters of the 18th and 15th of *September* were received by *Bohtlingk* and Co. on the 12th and 13th of *October*; and on the 16th of *October* they wrote in answer to *Crane*: "The ship *William* is just arrived. "We shall do all in our power to ship as soon as possible. We have already "bought for your account 60 tons of iron, &c. It is uncertain whether we "shall be able to procure you the quantity of tallow ordered. The lay days "stipulated in the charter-party of Capt. *Usherwood* do not permit us to wait "too long: we are therefore afraid we shall be obliged, in order not to expose "you to a greater loss, to arrange matters with Capt. *U.* as we have done with "Capt. *R.* by giving him deals." On the 19th of *October*, *Bohtlingk* and Co. inclosed the invoices for the iron and tallow in a letter to *Crane*, saying, "By "our next you will receive the bills of lading. We have purchased for your "account 66 bundles of hemp, &c.; they are already shipped on board of a "lighter for *Cronstadt*, and we will send you the invoices by the next post." On the 23d of *October*, they inclosed the invoices of the hemp to *Crane*. On the 26th of *October*, they sent *Crane* the bills of lading for the tallow, and wrote him word that they would send the other bills of lading in their next. The invoice of the iron was dated the 19th *October* 1798, that of the hemp the 23d, and that of the deals on the 2d of *November*. The two first were entitled, the one; "Invoice of 2395 bars of iron;" and the other, "Invoice of 66 "bundles of outshot hemp; bought for ready money, and shipped in a lighter "for the ship *William* Capt. *R. Usherwood* of *London*, for account and risk of "Mr. C. F. *Crane* in *London*." That of the deals, which was sent in a letter of the 2d of *November*, was intitled in the same manner, except omitting the lighter. In each of the invoices *Bohtlingk* and Co. charged brokerage and commission; and at the foot of each are the following words: "We de- "bit your account current for the amount." All the goods in question were shipped between the 19th of *October* 1798, and the 29th of the same month, both days inclusive, for and on account of *Crane*, but *Bohtlingk* and Co., having received information of the insolvency of *Crane*, caused bills of lading to be made out, which were signed by the defendant, and by which the goods in question were to be delivered to the order of *Bohtlingk* and Co., and the same were by them indorsed and transmitted to *John Schneider*, their agent or correspondent in *London*, in a letter dated the 2d of *November*, and were received by him accordingly; who made insurance thereon. On the 30th of *November*, *Bohtlingk* and Co. wrote to *Crane*, under cover to *Schneider* a letter, wherein, after expressing their doubts of his solidity, and dissatisfaction with his correspondence, they proceed: "We were surprised again to receive "an order for the shipment of different *Russian* commodities by the *Wil- "liam*, Capt. *Usherwood*, at a time when the situation of the *London* mar- "kets, compared to that of ours, left no other prospect in that undertaking, "than a loss as certain as considerable. Too much attached to your interest, "we should have preferred the entire non-execution of your order, and sacri- "ficed our commission, if the engagement made by you with the cap- "tain had not compelled us to give him his loading. We have still acted on "this occasion with so much good faith, that we already remitted last post "the bill of lading for 100 casks of tallow: but we have since received from "our friends at *Hamburg* the most alarming intelligence concerning you, "which proves that you have not been exact in acquitting our bills of the 15th "of *June*. You will acknowledge that this obliges us to act with more precau- "tion, and we trust you will not be against the just request we make you, "to furnish our friend Mr. *J. Schneider* with good security for the amount of

"the goods by the *William*: it is on that condition only, that we authorise him to deliver you the bills of lading of the hemp, iron, and deals which we are going to send him. In the contrary case you will have the goodness to deliver him without delay the bills of lading indorsed for the 100 casks of tallow, of which he holds the duplicate. Afterwards Mr. *Schneider* will make use of those documents to receive the cargo and effect the sale thereof for your account, employing the proceeds thereof in acquitting the bills of about 36,000 rubles, which we shall draw on you in a month, as we have already agreed. Still we hope you will not suffer the matter to come to that extremity, and that you will sooner make the necessary arrangements with Mr. *Schneider* to make us easy. Our old account, excepting the shipment by the *William*, will nearly balance by means of your consignments which are just arrived, and the bill which we drew on you dated 1st October for 8000 rs. Supposing always that there are no bad debts among those outstanding, for your account. As for the rest, we rely perfectly on your probity that you will be exact in paying duly our said bills of the 1st October, as well as those of the 31st August of 21,000 rubles," &c. On the same day, they wrote another letter to *Crane* by the post, containing this paragraph: "We notify to you, that we shall draw on you in the course of a month from this time the amount of the cargo per the *William*, Capt. *Usherwood*, and we request you'll honor our bills. Our old account is nearly balanced by the bills which we last drew on you." On the 2d November, *Bohtlingk* and Co. wrote to *Crane*; "We confirm our last by the last mail, and are since without any of your favours. This serves to inclose you invoice of deals by the *William*, Captain *Usherwood*, amounting to rs. 436: 35. We confirm to you what we lately advised you of, namely, that we shall draw on you after a month for the amount of our shipments by the above-mentioned vessel, our old account being nearly balanced by the bills which we have already drawn on you," &c. "We send this day to Mr. *Schneider* the bills of lading for the iron, hemp, and deals, per the *William*, Captain *Usherwood*. If you will then fulfil the condition we made to you to give Mr. *Schneider* the needful security, he will deliver you all the bills of lading; if not he will receive from you the bill of lading for the 100 casks of tallow, and on the arrival of the ship receive her cargo, and afterwards procure the sale thereof for your account: at all events, we have no doubt but that you will use every necessary means to satisfy the just demands we here make you; and thus this business will end without giving any trouble to you, and any uneasiness to us." On the 6th November, *Bohtlingk* and Co. wrote *Crane* a letter containing this paragraph: "On the 2d of November you received bills of lading and invoice of 445 deals per the *William*, Captain *Usherwood*, and we requested you to credit us for their amount rs. 436: 35. We repeated to you that we should draw on you after one month for the amount of the shipment by the said vessel." To which was added the following postscript: "We have withheld this letter until this day, the 9th of November, and can with pleasure assure you that Capt. *Usherwood* has since sailed. We hope that he will have a speedy and safe voyage." The iron, hemp, and deals in question were, on the ship's arrival at the port of *London*, viz. on the 4th of *January* 1799, demanded of the defendant by and on the behalf of the plaintiffs, and a tender of the freight charges and expences was duly made; but the defendant did not deliver the same to the plaintiffs. *Crane* committed an act of bankruptcy in *England* before any of the goods were delivered on board the *William* in *Russia*, but not before the purchase of the iron on his account, viz. on the 16th October 1798, and a commission of bankrupt afterwards issued against him, under which he was declared a bankrupt, and the plaintiffs chosen his assignees. The defendant, on the 12th of *January*, delivered the iron, hemp, and deals in question to *Schneider*, for and on account of *Bohtlingk* and Co., agreeable

to their indorsements of the bills of lading, upon being indemnified by *Schneider* as the agent of *Bohtlingk* and Co. By one of the mercantile navigation laws of *Russia*, published the 25th of *June* 1781, sect. 138, "it is ordered" that if in case of unpaid debts or bankruptcies any body has reason to suspect that the debtor or bankrupt has any thoughts of making the creditor lose, and therefore loadeth on board of ship or vessel goods or cargo; in such a case the creditor is to give notice in town to the head judge of the court, (in districts to the chief,) that the ship, or vessel, or goods, or the whole cargo should be retained time enough until the full payment is made "to whom due." (a) "In consequence whereof, and by virtue of this law, if the seller or shipper in case of bankruptcies can identify that the merchandize belonging to him is here in ships, warehouses, or wherever they may be, in such a case the goods must be given back to the sellers or shippers, being their property, and cannot be brought in concurs." *Bohtlingk* and Co. did not give notice to the head judge of the court, or detain the ship *William*, or her cargo, or any part thereof. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover?

Gaselee, for the plaintiffs, contended, 1st, That this being a delivery of goods by the consignor on board a ship chartered by the consignee, was a delivery to the consignee himself, and therefore the former was debarred from the right of stopping the goods *in transitu* upon the bankruptcy of the latter. In *Ellis v. Hunt*, 3 Term Rep. 464, after the goods had arrived at an inn in the place to which they were directed, and the assignee of the consignee had put his mark on them, that was holden to divest the consignor's right to stop them *in transitu*. There it was said, that there might be a delivery of goods by giving the key of the warehouse where they were deposited to the purchaser. *A fortiori*, therefore, a delivery to the consignee's warehouse would be a delivery to him: and a chartered ship is no more than the floating warehouse of the party by whom it is chartered. All the correspondence between the parties stated in the case shews that *Bohtlingk* and Co. considered the defendant as *Crane's* agent. But this point was expressly determined in the case of *Fowler and another, assignees of Hunter and Co. v. M^r Taggart and Co.*, tried before *Grose, J.* at *Bristol*, and cited in *Hodgson v. Loy*(b), that a delivery of goods into a ship chartered by the vendee, defeated the vendor's right to stop *in transitu*. That was trover by the assignees to recover the value of a certain quantity of tobacco shipped by the defendants by the order of the bankrupts, on board the *Minerva*, bound from *London* for *Naples* and *Alexandria*, which ship was chartered to the bankrupts for three years from *July* 1792, and which was paid for by a bill at three months, drawn by the defendants on the bankrupts, and accepted by them. The goods were shipped on the 4th of *February* 1793, for which the mate's receipt was given, and an invoice thereof was made out by the defendants in the names of the bankrupts. The vessel was detained by contrary winds at *Portsmouth*, during which time the bankrupts having stopped payment about the 11th of *March* 1793, the defendants procured bills of lading to be signed by the captain to them, and obtained possession of the tobacco in *September* 1794, and procured it to be relanded, and afterwards disposed of for their benefit. Here indeed the bankruptcy of *Crane* happened before the delivery of the goods on board the *William*; but it has been often ruled, that the bankruptcy of the vendee is no countermand of the goods, or annulling of the contract; as in *Ellis v. Hunt*, and other cases. Then 2dly, the law of *Russia* cannot vary this case, because, supposing it to apply to the case of a chartered ship, it has not been pursued. A method is there pointed out for the consignor to regain

(a) What follows was understood to be a statement upon the before recited law.

(b) 7 Term Rep. 412. The circumstances here stated which do not appear in the printed report were read from the brief in the cause.

possession of his property; namely, by process before the municipal judge: but that did not authorize him to take bills of lading to his own order from the captain of the vessel, who, though *Crane's* agent, was agent only with a limited authority, according to the terms of the charter-party, and therefore could not bind *Crane* beyond that authority; no more than in the case of *Fowler v. M. Taggart*: And though by the terms of the charter-party the captain was to sign bills of lading; yet it was for the purpose of enabling *Crane* to sell the goods while the ship was on its passage.

Wood, contra, was stopped by the Court.

LORD KENTON, C. J. : The decision in this case will not at all trench upon the general rule of law, respecting the right of stopping goods *in transitu*: but giving the plaintiffs the full benefit of the argument, that the delivery of the goods on board a chartered ship was a delivery to the bankrupt, still the circumstance of the *Russian* ordinance set forth in the case varies it very importantly, and takes it out of the general rule. By that law, the consignors, under the circumstances stated, had a right to repossess themselves of their goods; and they did so in effect: not indeed by actually taking them out of the ship on board of which they were laden, or by instituting legal process for the recovery of them; but having a right so to do, which it became unnecessary to exert, because it was in the first instance acknowledged and submitted to by the captain, in whose possession the property was, they imposed terms upon him, that he should sign bills of lading to their order, upon his compliance with which, they suffered the cargo to proceed to the place of its destination, disposable there as events might turn out. The goods are therefore sent with the condition attached to them. The law of *Russia* in this respect is a very equitable law; and I have often lamented that our own code was defective in the same particular. For every man contracting to supply another with goods acts on the presumption that that other is in a condition to pay for them; and therefore when the condition of the consignee is altered at the time of the delivery, and he is insolvent, and no longer capable of performing his part of the contract, honesty and good faith require that the contract should be rescinded. However, the contrary has been settled to be law, unless the consignor stop the goods *in transitu* before they get into the consignee's possession. But this being a transaction in a foreign country, where a more equitable law in this respect prevails, I am far from being desirous of limiting its operation; and for the reasons before given, I think that the consignors have substantially availed themselves of it; and that the defendant, by delivering the goods to their order, has done no more than he was bound to do.

GROSE, J. I agree to the general rule, that a delivery of goods by the vendors on board a ship chartered by the vendee is a delivery to the vendee himself. But the delivery here was made in *Russia*; and by a law of that state the goods were in effect in this case kept *in transitu*, notwithstanding they were delivered on board a chartered ship. Considering them therefore as *in transitu*, the *Russian* law is a most equitable provision, and ought to have a liberal construction; for it enables that justice to be done between the parties, which I have often lamented could not be obtained here.

LAWRENCE, J. If this transaction had happened in a port of this kingdom, the delivery of the goods on board a ship chartered by the bankrupt, would in effect have been a delivery to him. But the law of *Russia*, where this transaction took place, is otherwise. By that law it is provided, &c. [Here he read the law as stated in the case.] Then the owners having a right to repossess themselves of the goods after they were shipped, or in case of refusal to sue out process for that purpose, might have ordered the captain to deliver them up unless he had given them the security required by signing bills of lading to their order, which he complied with: then this was the same in ef-

fect as stopping the goods *in transitu*; and this by the law of *Russia* they were enabled to do, notwithstanding such a delivery.

LE BLANC, J. I agree with the construction which has been put upon the law of *Russia* in this case, and that the owners had a right to stop the goods notwithstanding the delivery which had taken place. Then instead of having recourse to legal process for that purpose, the owners first required of the captain to sign the bills of lading stated in the case to their order. If he had refused, it would then have been time enough for them to have used the compulsory process of the law; but that was unnecessary to be resorted to by the captain's compliance with their demand. Accordingly the captain signed bills of lading to their order, which was in effect a redelivery to the owners; in consequence of which, instead of stopping the goods by legal process as they might and would otherwise have done, they suffered them to remain on board the ship and to proceed to the place of destination. Therefore the law of *Russia* makes all the difference between this and the other cases referred to.

Postea to the defendant(1).

The King v. The Inhabitants of Everton.

¹ East, 526. June 10, 1801.

A son of age and married continuing to live with his father does not follow a settlement subsequently acquired by the father in another parish to which the son also accompanied him as part in fact of his household.

TWO justices by an order removed *John Payne*, his wife and children, by name, from *Great Barford* to *Everton*, both in the county of *Bedford*. The Sessions, on appeal, stated the following case: That *Thomas Payne*, the father of *John Payne* the pauper, being legally settled in *Everton*, resided there from the year 1779 to 1790 with his family, of which during the whole of that period the pauper was a part. In the year 1782, the pauper being 22 years of age, married *S. Barker* his first wife. The pauper and his said wife lived in the family of *T. Payne* the father, and as a part thereof, until her death, which happened in the year 1783. There was no issue of that marriage. The pauper never left the family of his father, but continued with him after the death of his said wife; and in the year 1790, removed with his father to *Great Barford*. The pauper's father afterwards, and during the time the pauper continued in his family, acquired a settlement there. And in *April* 1796, the pauper, who still continued to live with his father, married *Mary Reynolds*, by whom he had the children mentioned in the order. That the pauper had gained no settlement in his own right. The Sessions, being of opinion that the pauper was emancipated from the family of his father by his marriage with *S. Barker*, affirmed the order of the two justices, subject to the opinion of this Court.

Wilson, who was to have supported the orders, was stopped by the Court.

Const. contra, said that it had never been decided that marriage alone was an emancipation, but it was always accompanied with a departure from the house and protection of the father. On the contrary, it was considered otherwise in the case of *R. v. Wingham*, Burr. S. C. 223. But at any rate, the fact found by the sessions was conclusive against it in this case; for it is stated that during the whole period of his marriage with *S. Barker* his first wife, he was a part of his father's family.

LORD KENYON, C. J. The Sessions could not intend more by that statement than to inform us that locally and personally the pauper lived in the same house with his father, and took his fare at the same board with him; but they wish to be informed whether that so far constituted him in point of law one

(1) Vide *Boklingk v. Inglis*, 3 East, 381.

of his father's family under the circumstances, as that after his marriage he would follow a newly acquired settlement of the father; and I am of opinion that it did not(1)(2).

Per Curiam,

Both Orders affirmed(a).

The King v. The Inhabitants of Tardebigg.

1 East, 528. June 10, 1801.

The renting by a needle maker of certain *runners* in another's mill, together with a packeting room, of all which he had the exclusive use (a runner being a piece of machinery for scouring needles screwed down to the floor of the mill,) the whole being of the annual value of above 10*l.* including the separate value of the *runners*, is not the taking of a *tenement*, whereby a settlement can be gained.

TWO justices by an order removed *Ann Westwood* from *Tardebigg* to *Alvechurch*, both in the county of *Worcester*. The Sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case.

The pauper's late husband, *Aaron Westwood*, was a settled inhabitant of *Alvechurch* previous to the year 1790. In the course of that year, he took of *H. Milward* three runners for scouring needles in a mill belonging to *Milward*, situate in *Tardebigg*, and a packeting room, at the rent of one shilling per packet for every packet of needles scoured thereat. About two years afterwards, *Milward* built a cottage for *Westwood*, situate near the mill in the parish of *Tardebigg*, and *Westwood* took the same of *Milward* at the rent of 2*s.* 6*d.* per week. About two years afterwards, *Westwood* also took of one *Bartlett* three other runners for scouring needles in another mill, belonging to the said *Bartlett*, situate in the parish of *Tardebigg*, at the like rent of one shilling per packet for every packet of needles scoured thereat. And soon afterwards *Westwood* took of *Bartlett* another runner and a packeting room in the last-mentioned mill, at the rent of 2*s.* 6*d.* per week. He worked at the same respectively, and occupied the cottage and runners till the time of his death, which happened about two years ago. A runner consists of two

(a) In the case of *Bugden v. Amptill*, Burr. S. C. 270, the son after his marriage lived separate from the father, and both these circumstances formed ingredients in the opinion delivered by three of the judges. But *Wright, J.* only relied on the marriage of the son, "by virtue of which he becomes the head of his own family, which is an independent family." The same circumstances of marriage and separation from the father's household occurred in *R. v. Heath*, 5 Term Rep. 582. But in *R. v. Willon cum Twainbrookes*, 3 Term Rep. 356, Lord *Kenyon* enumerates marriage without more as one of the grounds of emancipation: but the point was never expressly decided before the present case; and here the circumstance of the son's being of age forms an ingredient. But it did not appear whether any stress were laid upon it in the judgment of the Court; though probably there was, as *Wilson* included that fact in the statement of the question before he was stopped by the Court.

(1) Vide *Springfield v. Wilbraham*, 4 Mass. Rep. 493.

(2) [A similar rule prevails in Massachusetts. Minor children can have no settlement separate from their father; but children, of full age, although voluntarily residing with him, do not also acquire the new settlement which he may have gained. The settlement, however, of a non-compos follows his father's, although he be of age. *Shirley v. Watertown*, 3 Mass. 322. *Springfield v. Wilbraham*, 4 do. 493. *Upton v. Northbridge*, 15 do. 237. Even if married, a male child can gain no settlement in that State, in his own right, during his minority. *Taunton v. Plymouth*, 15 do. 203.

In *Pennsylvania*, the rule is stated by Judge *Rogers*, in *Overseers of Washington v. Overseers of Beaver*, 3 W. & S. 548, to be this:—where a son becomes independent of his father's family, or emancipated from it, he will not acquire a settlement where his father goes to reside; but if he remain a part of his father's family, he will thereby acquire a derivative settlement from that of his father. A child is not emancipated so as to lose the benefit of any settlement which his father may gain until 21 or marriage, or till he has gained one in his own right, or till he has contracted a relation inconsistent with the idea of being part of his father's family. In the particular case, a lunatic son, of full age, residing in his father's house, acquired the new settlement which his father had gained.—W.]

pieces of wood, each about five feet long, and eighteen inches broad: one of them is fixed with screws to the floor of the mill, which may be unscrewed and removed at pleasure: the other is moved upon it horizontally backwards and forwards, by means of a piece of timber fixed thereto at one end thereof, and which communicates at the other with the wheel of the mill; and between these pieces of wood needles are scoured in bags with oil and emery dust. The runners so rented by *Westwood* were the property of *Milward* and *Bartlett*. In the mills of this description there are usually in the same place several different runners worked by different workmen; but at the time when *Westwood* took the said three runners of *Milward* they were divided by a partition from the other runners in the same mill; but the partition being found to take up too much room was afterwards removed, and *Westwood*, his wife, and their two children slept in the same mill from the time they first took it until *Milward* had built the said cottage, a period of about two years. One floor of a mill will contain several runners, some of which may be placed on the floor, and others immediately over; these, in a frame of wood about two feet above the undermost. For some time *Westwood* worked at scouring needles at the rate of six shillings and sixpence per packet, for *Milward* only. Afterwards *Milward* not continuing to have sufficient employ for *Westwood*, he worked for other masters. No other workmen had any right to use the runners so rented by *Westwood*, without his consent; but *Westwood* had the exclusive right to the use of them and the packeting room. The materials used in scouring the needles were provided by *Westwood*; and the rent which he paid to *Milward* and *Bartlett* for the runners so taken of them, and for the cottage taken of *Milward*, amounted together to more than ten pounds per annum.

When this case was called on, the Court asked how it could be distinguished in principle from *Rez v. Dodderhill*, 8 Term Rep. 449.

Erskine and *Jervis*, in support of the order of Sessions, said, that there the pointing places in the mill, which were equivalent to the runners here, were not in the exclusive possession of the pauper, who was only at liberty to use any two out of several pointing places. But here the pauper's husband had an exclusive possession of particular runners, as well as to the packeting room, with which the runners were connected; thereby adding to the value of the packeting room, which no doubt was a tenement. The pauper's family slept there for a time. Altogether, therefore, it was a taking of part of the mill. In *Rez v. Whitechapel*, Hil. 26 Geo. 3. 2 Const. 154. pl. 194, it was holden, that a furnished room with fire found in it, rented by the week for a particular purpose, that of a justice meeting, and the landlord to have the use of it at other times, was a tenement sufficient to confer a settlement: though no doubt the value of 10*l.* a-year was made up by the addition of the fire and furniture.

Caldecott and *Ryder*, contra, were stopped by the Court.

LORD KENYON, C. J. There is no distinguishing this from the case of *The King v. Dodderhill*. A runner is no more a tenement than a pointing place is so. It might as well be said to be a taking of a tenement if a man contracted to pound in a certain mortar, or to use a particular grinding-stone in a mill. It is not in effect a taking of a part of the mill as a tenant, but a licence to use a particular part of the machinery of it for the purpose of manufacture, and for no other purpose.

LAWRENCE, J. The case of *The King v. Whitechapel* does not apply; for here the particular value of the runner is found, which is necessary to be taken into the account to make up the 10*l.* a-year; and that not being a tenement cannot confer a settlement. Besides, it is not even stated that the runner is in the packeting room which was appropriated to the pauper's use.

Per Curiam,

Order of Sessions quashed (1).

The King v. The Inhabitants of Rainham.

1 East, 581. June 10, 1801.

A contract under seal, and stamped to serve another for 3 years at so much per week, the master agreeing to learn the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much per day, constitutes an apprenticeship. And at any rate, the pauper having served under it for more than a year gained a settlement either as an apprentice, or as a hired servant.

TWO justices by an order removed *Moses Smith*, his wife and six children, by name, from *Rainham* in the county of *Essex* to *Eltham* in the county of *Kent*. The sessions on appeal quashed the order, subject to the opinion of this Court on the following case: The pauper, on the 8th of *November* 1784, entered into an agreement under seal with one *Hills*, a sawyer, living in *Eltham*; which agreement is in the words and figures following, (viz.) "An agreement made the 8th of *November* 1784, between *T. Hills* of *Eltham*, sawyer, and *M. Smith* of the same place; viz. *Smith* doth agree with the said *T. Hills* to serve him for three years from the date of the agreement in the following manner, viz. for the first year to be paid ten shillings per week, for the second year eleven shillings, and for the third year twelve shillings per week. And the said *T. Hills* doth agree and promise to learn the said *M. Smith* the art and mystery of a sawyer, which he now follows. And it is likewise agreed, that if *Smith* shall wilfully lose any time to the prejudice of *Hills*, he doth hereby agree to pay to *Hills* three shillings per day for all such neglect. And it is hereby further agreed, that if *Smith* repents of this agreement before the time expires, he promises to pay *Hills* 10*l.* on demand; or if *Smith* is sick, or by any disorder or misfortune rendered incapable of work, not to receive any pay from *Hills*." The agreement was signed, sealed, and delivered by both parties, and lawfully stamped. No premium was paid by the pauper to *Hills*. The pauper in pursuance of the agreement immediately went to *Hills*, and resided with him in *Eltham*, under and according to the terms and conditions of the agreement for two years and a half.

Pooley and *Wingfield*, in support of the order of Sessions, contended, that in order to gain a settlement by serving as a hired servant, or as an apprentice, it was not only necessary that there should be a legal contract to serve specifically in one or other of those capacities, but the parties should so intend; for if it be either uncertain in what capacity the pauper contracted, or if it appear that the parties intended the service to be in another character than that which enures by construction of law from the nature of their contract, no settlement can be gained from such contract and service. This was pointedly expressed by the Court in *R. v. Laindon*, 8 Term Rep. 379, where it was holden that a defective contract of apprenticeship (there being no stamp) could not be converted into a contract of hiring and service. It was indeed there decided, that a contract of apprenticeship might be framed without the party being retained *eo nomine* as an apprentice: but there stress was laid on the circumstance of a premium having been given to the master to teach the other his trade. On the other hand, in *R. v. Coltishall*, 2 Term Rep. 193, where no premium was given, and the pauper was to do any other kind of work besides the trade which he was to be taught, under which he served above a year, it was holden to enure as a hiring and service, notwithstanding the principal object was to learn the trade. Now here it is uncertain in what capacity the service was intended to be performed: not as an apprentice; for the pauper was not retained by that name, nor was any premium given, as in *R. v. Laindon*, and he was also to receive wages: not as a servant; for he went

to learn a trade, and was not compelled, as in *R. v. Coltishall*, to do any other kind of work. And it is probable, by the finding of the Sessions giving no effect to this contract and service, that they were of opinion, that though the contract enured as an apprenticeship in law, yet that the parties in fact intended a hiring and service.

Trower and *Bosanquet* were to have argued *e contra*.

LORD KENYON, C. J. The Sessions have stated the deed and the service under it in fact, leaving this Court to draw the legal conclusion; and that can only be done in one way, namely, that this was a contract of apprenticeship. The instrument was under seal, and need not be indented^(a). It has been determined, that the party serving need not be retained *eo nomine* as an apprentice; but that it is enough if the purpose of the contract be, that the one shall teach and the other learn the trade. That is the case here; for the master engaged to learn, i. e. to teach, the pauper the art and mystery of a sawyer; and the object of the pauper was to be taught the business. No technical words are necessary to constitute the relation of master and apprentice: nor is it necessary that there should be any premium given to the master.

LE BLANC, J. The contract was either to serve as an apprentice, or as a hired servant; it is immaterial which it was in this case; for as the pauper served above a year under the agreement, *quacunque via data*, he gained a settlement.

Per Curiam,

Order of Sessions quashed.

The King v. The Churchwardens and Overseers of the Poor of the Lower Quarter of the Parish of Alberbury in the County of Salop.

1 East, 524. June 10, 1801.

Lime works are rateable in the hands of the occupier, though there be risk and expence in the working, and the profits are uncertain.

ON an appeal against the poor rate, because neither the proprietors nor the occupiers of certain lime works within the said quarter were rated therein for the said works, and in order to have the general question settled, *viz.* whether such works are rateable to the poor or not? the following case was agreed upon, and has been returned by the Court:

William Jellicoe appealed to the last quarter sessions for the county of *Salop* against a rate made by the churchwardens and overseers of the poor of the lower quarter of the parish of *Alberbury* in the same county. The sessions amended the rate by charging *John Morris* and *T. Butters* 173*l.* as joint occupiers of certain lime works in the same quarter. It appeared, that *John Morris* and *T. Butters* were joint occupiers of certain lime works in the quarter under *Sir Robert Leighton* and *Richard Lyster Esq.* to each of whom they pay a royalty, amounting upon an average to 200*l.* to *Sir Robert Leighton* and 60*l.* to *Mr. Lyster*, per annum. The lime-stone when got is burned in kilns on the premises. Owing to the risk and expence of working, the profits of the occupiers are very uncertain. The only question is, Whether the occupiers or proprietors, or either of them, are rateable to the poor for these lime works?

Erskine, *Caldecott*, *Benyon* and *Clifford*, in support of the order of Sessions. The only ground on which the negative of the question can be argued for is, that "owing to the risk and expence of working, the profits of the occupiers are very uncertain." But if there be profits, whether more or less,

they must be liable to be rated, and the quantum is a question for the sessions alone to determine. The produce of all labour must be attended with expence and risk; and from the nature of a lime work, the expence and risk is capable of being more accurately calculated than most other concerns(a). In *R. v. Vandewall*, 2 Burr. 991; 1 Blac. 212, S. C., quit rents and other casual profits of a manor were not considered as the objects of rating; but that was because they arose out of the profits of land for which the occupiers were rateable in another shape. [Lord Kenyon, C. J. The case of quit-rents goes on the objection of double rating the same property in the hands of the landlord as well as the tenant.] In *Atkins v. Davis(b)*, Lord Mansfield, though arguing against the rateability of the London water-works assumes it to be clear that a lime-stone quarry would be rateable: and this upon the same universal principle that the case of the Cheltenham spring, *R. v. Miller*, Cowp. 619, went, as so much profit arising out of land. The reason why lead mines, *R. v. Richardson*, 3 Burr. 1341, were holden not to be rateable, was not because of any supposed risk or expence, or uncertainty of profit attending the adventure; but because coal mines alone were mentioned in the stat. 43 Eliz. c. 2, which was taken to be an exclusion of all other mines. It is not, however, every excavation of the earth which is a mine: otherwise a gravel, or marl, or sandpit might be said to be a mine; but it must be such as requires skill and science in the working, and which is effected by means of mechanical operations: whereas the lime rock lies for the most part at or near the surface, and is worked by common labourers in the ordinary course of their employment.

The Attorney General, Gibbs, and Pemberton, contra, contended that this was a mine, and therefore must be governed by the same principle as the case of the lead mine. That it was not like the case of the Cheltenham spring, for that was a rate upon the land itself, rendered more valuable on account of the spring rising within it. But this was a rate specifically upon the lime works independent of the land; and therefore it was liable to the same objection, as with respect to quit-rents, that it was a double rate upon the same property. That the uncertainty of the profits was in itself an objection which went to the rateability of the subject matter; and was the ground on which the case of *Rex v. Vandewall* was determined.

LORD KENYON, C. J. The only question is, whether the persons named in the rate as the occupiers of the lime works are rateable in respect of that species of property? The landlords, who derive a certain profit upon it in the nature of rent, could not have been rated, because that would be to rate the subject matter twice. But what possible objection can there be to the rate upon the occupiers. There is no pretence to call this a mine. But the land itself is convertible into a source of profit, said indeed to be uncertain; but it is well known to be productive, and the very statement of this case shews it to be so(c). And as to the quantum, that must be settled by the sessions.

Per Curiam, Rule for quashing the Order of Sessions discharged(1).

(a) Vide *Atkins v. Davis*, Cald. 324, 5. 333.

(b) Vide *Atkins v. Davis*, Cald. 338.

(c) The profits paid to the land owners were considerable: and in *Rex v. Parrott and others*, 5 Term Rep. 593, the lessee of a coal-mine was holden liable to be rated, though he derived no profit from the mine after paying the rent to his landlord.

(1) It has since been held, that the occupier of a slate-work is rateable for the same. *The King v. Moorland*, 2 East 164. So of a clay-pit. *The King v. Brown*, 8 East, 528.

Schumann v. Weatherhead.

1 East, 587. June 9, 1801.

Where a former rule for setting aside an annuity was discharged because it did not appear that an indorsement [not memorialized] containing a clause of redemption [bearing date after the deed] had been made prior to the execution of it; in which case it could not be received in evidence for want of being stamped; the Court will not enter into the question on a subsequent rule; although it appears clearly that the indorsement was made before the deed was executed; and that such clause of redemption was not inserted in the memorial of the annuity enrolled according to the stat. 17 Geo. 2. c. 36.

This was a rule calling on the plaintiff to shew cause why the judgment entered in the cause should not be vacated, and the warrant of attorney to confess judgment, and the deed given to secure an annuity, be declared void under the stat. 17 Geo. 3 c. 26, and delivered up to be cancelled. It appeared upon shewing cause, that in last *Easter* term, the defendant obtained a similar rule upon an affidavit made by him, stating, that by an indenture dated the 30th of November 1793, for the consideration of 420*l.* he granted an annuity of 60*l.* for his own life to *Schumann*, payable out of a certain rectory and vicarage. That on that indenture there was the following indorsement, bearing date the 5th of December 1793: "Memorandum, that at the time of the execution of the within written indenture, it was agreed by and between the within-named *J. Weatherhead* and *P. Schumann*, that *W.* should be at liberty at any time to redeem the within-mentioned annuity on giving six months' notice in writing to *S.*, and paying the whole of the arrears then due, &c." Signed by both parties and witnessed. that *W.* also gave the bond and warrant of attorney, &c. to secure the said annuity. And the defendant's attorney deposed, that upon searching the proper office he found a memorial of the indenture, bond, and warrant of attorney, enrolled, but no memorial of the indorsement for the re-purchase or redemption of the annuity. Upon shewing cause last term against the first rule, the Court then discharged the rule (though without costs,) because the indorsement which appeared to have been executed at a different time from the indenture, was not stamped; without which, considered as a separate instrument, though written on the same parchment, it could not be received in evidence. It now appeared however by the affidavits on which the present rule was obtained, that the annuity was originally agreed to be granted upon the terms of being redeemable; but that by mistake or neglect the indenture had been drawn without such a clause; and therefore, when it was tendered for execution on the 30th of *November*, the day on which it bears date, and when it was intended to have been executed, the defendant on discovery of the omission objected to execute it; in consequence of which the indorsement above mentioned was made before the execution of the instrument; and both were executed together on the 5th of *December*, when the indorsement bears date. But the memorial, which was inrolled on the 14th of the same month, omitted to state the clause of the redemption. It also appeared now by the affidavits against the rule, that by two several indentures of assignment, each of a moiety, one dated the 12th of *July* 1800, and the other the 12th of *February* 1801, *Schumann* for a valuable consideration assigned the annuity to one *G. Bifield*, by whom in truth this rule was resisted; and *Bifield* deposed, that *Schumann* had left *England* to reside as he believed in *Germany* before the present rule was obtained; that *S.* had shewed cause last term; and would, it was believed, have stayed here longer, if he had expected that the annuity would again have been questioned.

Gibbs, and *Bedford* shewed cause, and relied on the case of *Greathead v. Bromley*, 7 Term Rep. 455, as in point, to shew that where an application had

been before made to set aside an annuity, which was canvassed on the merits, and the rule discharged, because no sufficient case was then made out, the Court will not entertain a similar application; at least not without the party can shew some new and material fact, which was not within his knowledge at the time of the first application: for otherwise there never would be an end of litigation. They also objected, that the party or witness to the deed ought not to be admitted to give evidence that it was executed on a different day from that on which it bears date, as that would be to contradict the deed. [But Lord *Kenyon* said, that there was no ground for that last objection: but the *veritas facti* might be shewn.] That at any rate, it was too late to take the objection now, having waited till the grantee of the annuity was gone to reside in another country, and the assignee was deprived of the benefit of his testimony. And they cited *Haynes v. Hare*, 1 H. Blac. 659, wherein parol evidence of an agreement, that the grantor should be at liberty to redeem an annuity, was rejected after the death of the grantee.

Garrow, in support of the rule, attempted to distinguish this from the case of *Greathead v. Bromley*; for this was rather to be considered as an opening of the former rule than as a distinct application. The former rule was discharged on the 5th of *May* only, not because it was sworn that the indorsement was executed at a different time from the deed, but because it did not appear that it had been executed at the same time. In consequence of that, the present affidavits were made the day after, and the present rule to shew cause granted in the same term, in order to bring the fact more distinctly before the court. The fact now appears uncontroverted. And as to *Schumann's* absence, if it be supposed that he can alter the statement, this rule may stand over to enable the assignee to procure his evidence. The attention of the Court was not sufficiently drawn to the manner in which this fact appeared in the affidavits upon the former rule; otherwise, instead of discharging that rule and granting another shortly afterwards, they would have enlarged the first rule, in order to give the defendant an opportunity of stating the truth of the fact distinctly as it now appears.

LORD KENYON, C. J. Among the many cases which we have been called upon to decide upon applications for setting aside annuities, none contains a more convenient rule of decision than that which was laid down in *Greathead v. Bromley*; and as the report of that case contains my opinion very explicitly upon the subject, I cannot do better than read what is there stated, in which I fully concur. [His lordship then read that case.] That opinion was grounded upon the maxim, that "*interest reipublicæ ut fit finis litium.*" Now unless we are prepared to rescind our opinions then expressed, that case must govern the present; for it stands directly on the same ground in every word and circumstance. All the facts existed within the knowledge of the parties at the time of the former rule pending, as are now brought forward. And though if we had then been as fully apprised of all the circumstances as now, it might have altered our opinion; yet it is better for the general administration of justice that an inconvenience should sometimes fall upon an individual, than that the whole system of law should be overturned, and endless uncertainty be introduced. I should be sorry to see one decision in 1798, and a different decision on the same facts in 1801. I think the rule was wisely and not arbitrarily laid down in the case referred to, founded upon analogy to proceedings in other cases. The proceedings in ejectment were invented for the very purpose of obviating the hardship, as it was supposed, of having a title to real property bound by the first decision. But I do not think there is any hardship in this case. However, I will not draw in aid any extraneous argument in support of the rule laid down in the case of *Greathead v. Bromley*; but approving it as I do, I think it ought not to be disturbed, and that it governs the present case.

GROSE and LAWRENCE, Justices, considered the question as concluded by

the authority of *Greathead v. Bromley*; and that this matter having passed *in rem judicatum*, the merits of the case could not now be entered into.

LE BLANC, J. expressed himself to the same effect; and added, that no injustice would ensue from abiding by the rule; for where it appeared to the Court that there had been a mere slip or mistake in disposing of a former rule, it was not unusual upon a proper case made out to open the rule again: but where the former rule had been disposed of after hearing the parties, as it now appeared upon the very point of objection now urged, he thought they were not entitled to ask to have it opened again.

Rule discharged.

Bowen, one, &c. v. Shapcott, in Error.

1 East, 542. June 12, 1801.

To a plea in abatement of misnomer of plaintiff, replication that the plaintiff was known as well by the one name as the other: upon demurrer over-ruled, there must be judgment of *respondens ouster*, and not *quod recuperet*.

THE plaintiff below, by the name of *Sarah Shapcott*, brought her action of *assumpsit* in *C. B.* against *William Bowen*; to which he pleaded, "that the said *Sarah* now is, and before and at the time of suing out her original writ aforesaid, was called and known by the surname of *Shapcott*," &c. traversing that she was known by the name of *Shapcott*: "and this he is ready" to verify, wherefore he prays judgment of the said original writ and of the declaration aforesaid, and that the same may be quashed." Replication, that she the said *Sarah*, long before, and at the time of suing out her original writ, was called and known as well by the surname of *Shapcott* as by the surname of *Shippott*; concluding to the country. To this there was a demurrer, stating that the matters in the replication contained were not sufficient in law for the said *Sarah* to have or maintain her said action thereof, &c. wherefore, &c. the said *William* prays judgment, and that the said *Sarah* may be precluded from having her said action thereof against him, &c. Joinder in demurrer, concluding, as usual, with a prayer of judgment and her damages by reason of the premises, to be adjudged to her, &c. on which there was judgment by *C. B.* that the replication was sufficient in law for the said *Sarah* to have her aforesaid action thereof maintained against the said *William*, &c. by reason whereof the said *Sarah* ought to recover her damages by occasion of the premises, &c. and an award of a writ of inquiry to the sheriff to assess the damages; on which the damages were accordingly assessed at 7*l.* 6*s.* 9*d.*, and final judgment given for the same, and the costs, &c. On this a writ of error was brought, and several errors assigned, amongst others, that the said judgment is a final judgment for the said *Sarah* to recover her damages, costs, and charges aforesaid, against the said *William*: whereas it ought to have been an interlocutory judgment only, for the said *William* to answer over, &c.

Const for the defendant in error. The rule is, that where the judgment prayed goes to the writ, there it is *ut respondens ouster*; but where it goes to the action, it is *quod recuperet*. Now here, if issue had been taken, and the fact found against the defendant, the judgment must have been *quod recuperet*: then by demurring to the replication he admits the fact, and calls for the judgment of the court, whether the action be maintainable, and he cited *Gilb. C. B.* 53. But,

By the Court. The rule is laid down in *Eichorn v. Le Maitre*, 2 Wils. 367, that where one plead a fact which he knows to be false, and a verdict be against him, the judgment is final: but upon a demurrer to a plea in abatement, there shall be a *respondens ouster*; because every man shall not be

presumed to know the matter of law, which he leaves to the judgment of the Court. That rule governs the present case, which is that of a demurrer to a replication to a plea in abatement.

Judgment of *C. B.* reversed, and
Judgment of *Respondeas Ouster*
entered.

Parke v. Eliason and Others, Assignees of Persent and Bodecker, Bankrupts.

1 East, 544. June 12, 1801.

A. desires leave to place certain long bills in *B.*'s hands, and to be allowed permission to draw without renewals bills of shorter dates, and desires *B.* to calculate the sum to be drawn for, allowing commission, and the long bills indorsed by *A.* are inclosed to *B.* in the same letter. *B.* answers that agreeable to *A.*'s wishes he had discounted the bills, and then specifies the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills on condition of being allowed to draw shorter bills: and *B.* having accepted *A.*'s bills, and such acceptances being dishonoured in consequence of *B.*'s bankruptcy, and the long bills having remained in specie in *B.*'s hands at the time of his bankruptcy, and *B.*'s assignees having afterwards received the value of them, *A.* may recover the amount from them as money had and received to his use.

THIS was an action for money had and received by the defendants to the plaintiffs' use; to which the defendants pleaded the general issue. The cause was tried at the sittings after last *Hilary* term before Lord *Kenyon*, when the jury found a verdict for the plaintiffs for 4710*l.* 10*s.* 6*d.*, and costs 40*s.*, subject to the opinion of this Court on the following case. On the 17th of *August* 1799, *M. Cullen*, as agent for the plaintiff, wrote a letter to Messrs. *Persent* and *Bodecker*, merchants in *London*, inclosing several bills of exchange, indorsed in blank by the plaintiff, amounting to 4837*l.* 10*s.* 11 3-4*d.* as follows: "A friend of mine wishes to place the within inclosed bills, amounting to 4837*l.* 10*s.* 11 3-4*d.* in your hands, to be allowed permission to draw without renewals at two or three months, allowing the commission formerly mentioned in your letter. I shall be obliged by your making a calculation of the sum to be drawn for. Your compliance will much oblige, &c.

13th *July* 1799.

2nd *March* 1799.

31st *October* 1797.

31st *October* 1797.

<i>Sterling</i> and <i>Hunter</i> 's	
note at six months, £ 1423 7 4	
<i>Pardo</i> on <i>Da Costa</i> ,	
nine ditto, -	733 11 0
<i>G. Fraser</i> and <i>Co.</i> on	
<i>Hymen, Cohen</i> , and	
<i>Co.</i> , fourteen do. -	474 0 0
<i>Parke</i> on <i>Auguilar</i> and	
<i>Co.</i> , fourteen do. -	1527 13 0
<i>Bogle</i> and <i>Jopps</i> on <i>Jepp</i> ,	
twenty-seven do. -	378 19 7½
<i>Do.</i> on <i>do.</i> twenty-	
seven do. -	300 0 0

£4837 10 11½

On the 19th of *August*, 1799, *Persent* and *Bodecker* returned the following answer to Mr. *Cullen*: "We have been duly favoured with your letter of the 17th, covering your remittances for 4837*l.* 10*s.* 11½*d.*, which agreeable to your wishes we have discounted; and beg leave to hand you annexed an account thereof, by which you will observe there remain 1710*l.* 6*s.* 6*d.* for you to value upon us at three months' date without renewal, which drafts will on presentation meet due honour." On the 26th of *August*, *Cullen* wrote to

Persent and *Bodecker* as follows: "I duly received your esteemed letter of the 19th current, and return you my best thanks for its contents. Mr. *John Parke* will draw for the bills you discounted, which please to honour." On the 28th of *August*, *Persent* and *Bodecker* wrote to *Cullen* as follows: "Your esteemed favor of the 26th instant apprises us, that Mr. *John Parke* has your authority to draw for the bills which we discounted, which draft will meet due honour." On the 21st of *August*, the plaintiff drew bills at three months date upon *Persent* and *Bodecker*, amounting to 4710*l.* 6*s.* 6*d.*, being the amount of the bills sent to them as aforesaid, allowing to the plaintiff interest for the three months, and deducting the commission agreed upon: which bills were accepted by *Persent* and *Bodecker*; but they soon afterwards became bankrupts, and did not pay any of such acceptances. In *September*, 1799, *Persent* and *Bodecker* became bankrupts, having in their hands the several bills received from the plaintiff unnegotiated; and for which the defendants as their assignees in and previous to *May* 1800 received the full amount. Three of the acceptances amounting to 1600*l.* given by *Persent* and *Bodecker* to the plaintiff were negotiated by him; but in consequence of the bankruptcy of *Persent* and *Bodecker* they were returned to him dishonoured; and he tendered the same, and also the other six bills, amounting to 3210*l.* 6*s.* 6*d.*, which had not been negotiated, to the defendants on the 18th of *September* 1800, previous to the commencement of this action, and demanded payment of the money which they had received upon the bills discounted by the bankrupts as before stated. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover in this action?

Wood for the plaintiff. The original bills were only deposited with the bankrupts before their bankruptcy in the nature of a pledge, to secure them up to the extent of their acceptances, which they had lent the plaintiff upon the terms proposed. Then those acceptances not having been paid, the consideration for the deposit failed; and the bills deposited remaining unnegotiated in the hands of the bankrupts, and unmixed with the general mass of their property, the assignees had no right to receive payment of them: but having so done, it is money had and received to the use of the plaintiff whose property in the bills still continued. That the bills were merely deposited as a pledge, and not intended to be discounted or sold in the market, appears by reference to the correspondence. The first letter says, "A friend of mine wishes to place the inclosed bills in your hands, to be allowed permission to draw," &c. "I shall be obliged by your making a calculation of the sum to be drawn for." The intention therefore was, that the plaintiff, in consideration of the security lodged with the bankrupts, might draw upon them from time to time for so much as the bills would cover, deducting their commission, &c. The word *discount* being introduced by the bankrupts in their answer could not alter the nature of the terms on which the deposit was made: but at any rate, it meant no more than calculating the amount of the sum for which the plaintiff might draw upon them. The bankrupts' acceptances could not have been taken in exchange for the other bills, because they would become due long before. Those acceptances have been offered to be returned to the assignees.

Taddy, contra. The bills were either transferred to the bankrupts, 1st, on a general banking account; or 2dly, to answer a specific purpose, and reimburse them for their advances to the plaintiff; or 3dly, which is the real nature of the transaction, upon an exchange of property. The circumstance of the bills having been indorsed by the plaintiff to the bankrupts is decisive to shew that he meant to divest himself of the whole property, and not merely to deposit them as a pledge. If the latter only had been intended, there was no occasion to indorse them; for that enabled the bankrupts, if they thought fit, to negotiate them. The legal effect of the indorsement and delivery of the bills was to pass the property to the bankrupts; and all the cases of depo-

sits(a) shew an agreement between the parties to control the operation of the law in that respect. But here there was nothing in the agreement to prevent the bankrupts' negotiating the bills immediately after they received them. The bankrupts themselves so considered it at the time. They represented the transaction as a discounting of the bills; and that was not denied by the plaintiff. The probability too is on the same side; for the plaintiff was a stranger to the bankrupts at the time; and had no account with them, as in the case *ex parte Dumas*, and in *Took v. Hollingworth*; but it was a simple transaction of discounting bills in the market. Supposing there had been no bankruptcy, and the original bills had not been paid when due, the only remedy the holders would have had would have been upon the plaintiff's indorsement: then the bankruptcy can make no difference, as was said in *Hollingworth v. Tooke*, in Error, 2 H. Blac. 503. The nature of this transaction is a mere exchange of property; as in *Rolfe v. Caslon*, Ib. 570; the one set of bills were a consideration for the other. It is true, that here the original bills were at long dates, and would not become due till after the bankrupts' acceptances; but that shews that the former could not have been deposited to answer the latter; because they would not have answered the purpose of putting the bankrupts in cash; and therefore could only have been intended to reimburse them afterwards, like any other case of a discount. Again, if this had been meant as a deposit, the agreement would have been to draw *with* renewals, and not *without*: but the latter makes an end of the transaction, and shews that no further account was intended between the parties. If this be a case of deposit, then every case of a customer putting bills into his banker's hands will be the same; but that was considered otherwise in *Bent v. Puller*, 5 Term Rep. 494.

Wood, in reply. The indorsing of the bills pledged by the plaintiff cannot make a difference in the nature of the agreement; because that was necessary to enable the bankrupts to receive payment of them in case they complied with the condition of the deposit. Nor is it any objection to consider this as the case of a pledge, because the legal property passed to the bankrupts; for that is the case *pro tempore* of every pledge. In the case put of the bankers, if the bills were paid in by a customer on his general account, then he could not recover them back in case of a bankruptcy: but it is different where bills are paid in on a specific account; because the bankers have then no right to appropriate them to any other. The effect of the stipulation against a renewal of the bills was no more than an engagement by the bankrupts that they should be punctually paid when due.

Lord KENYON, C. J. Some confusion has arisen by supposing that there is a technical sense annexed to the term *discount*, which cannot be gotten rid of; but that is explained by considering the true nature of the transaction. If the bills had been taken to the bankrupts upon a simple proposal to discount them, the transaction would have been merely that of a purchase, and no question could have arisen. But this is nothing like a case of discount; but the bills were placed in their hands to answer a particular purpose. The first proposal to them is to know to what extent the plaintiff might draw on them upon a deposit of the bills. The bankrupts by their answer accept the offer, and specify the amount to which they will honor the plaintiff's drafts at three months' date. If this had been a new case, there might have been as much difficulty in it as there was in the case of *Tooke v. Hollingworth*, 5 Term Rep. 216, which was very fully considered. There was indeed a difference of opinion among the Judges of this court, but a majority thought with the plaintiff, and their judgment was afterwards confirmed in the Exchequer chamber upon a writ of error. The same principle was afterwards recognized in the case of *Bent v. Puller*, 5 Ib. 494, though the conclusion was

(a) *Ex parte Dumas*, 1 Aik. 232. and 2 Ves. 562. *Tooke v. Hollingworth*, 5 Term Rep. 216, and *Zinck v. Walker*, 2 Blac. 1154.

different upon the facts there disclosed ; and it appeared to me that Mr. Justice *Buller*, who differed from the rest of the Court in the first case, relented a little in the subsequent one. At any rate, however, the point is now settled, and the distinction clearly ascertained between the case of bills paid into a banker's hands on a running account, and the case of a single transaction like the present, where the deposit is made for a special purpose. Here the bills were deposited for the express purpose of enabling the plaintiff to draw on the parties to a certain amount ; and those very bills, having an ear-mark on them which distinguished them from the mass of the bankrupts' property, remained in specie in their possession at the time of the bankruptcy : then shall the assignees be permitted to appropriate them to the use of the bankrupts' estate, when the other acceptances, in consideration of which the deposit was made, have not been paid ? The assignees can only take the property of the bankrupts, subject to every equity to which it was liable in their hands ; and they having received these bills upon a condition which has failed, it is *secundum equum et bonum* that the plaintiff should recover back the value of them. I refer to the principles established in *Tooke v. Hollingworth*, and *Bent v. Puller*, which are plain and intelligible to all men, and I must lean against making any exceptions to them upon nice distinctions, which would serve only to perplex commercial transactions.

GROSE, J. I consider this as a case of bills placed in the hands of the bankrupts to answer a particular purpose, and that purpose not having been answered, the owner is either entitled to receive back the bills themselves in specie, or to recover from the defendants the produce of them. The case of *Tooke Hollingworth* decides the present question : and it seems to me that Mr. Justice *Buller* in *Bent v. Puller* acceded to the doctrine established in the former case. This was one simple unmixed transaction. There was no general account before existing between the parties ; nor was it the general case of a discounting of bills. The proposal in the letters is to have *leave to place* the bills in their hands, and, in consideration of that, to have *leave to draw* upon them other bills to a certain amount. The bills deposited, were of much longer dates than those given by the bankrupts. And the conduct of the bankrupts shews plainly what they thought of the transaction. For though in distress, yet they never negotiated the bills so deposited, but honestly retained them in specie in their possession at the time of the bankruptcy. The bankruptcy then could not give the assignees more right to dispose of them than he bankrupts themselves had ; and the original purpose for which they were deposited not having been answered, the assignees cannot in conscience retain the produce of the bills.

LAWRENCE, J. This is to be considered as a case of bills deposited for a particular purpose, and not an exchange of one set of bills for another. The first offer is, "to place the bills in your hands." It is not to *exchange* them for other bills. For this the plaintiff is "to be allowed permission to draw without renewals at two or three months." The meaning of which was an offer to deposit the bills in question, which had a long time to run, on condition of being permitted as his convenience required, to draw bills on the bankrupts of a shorter date. And then the writer desires them to calculate to what amount the plaintiff shall have leave to draw upon them. Then the bankrupts in answer say, that "*agreeable to your wishes* we have discounted." But how must that be understood ? the desire expressed by the plaintiff was to place the bills in their hands, and to have *leave to draw bills of shorter dates*, and to know to what extent he might be allowed so to do. When therefore the bankrupts say, that *agreeable to their correspondents' wishes* they had discounted, it must be understood that they had accepted of the proposal made to them, and used the latter expression with reference to the calculation of the amount which upon deducting interest and commission they meant to allow to be drawn upon them. The original bills were therefore deposited

upon the condition of the plaintiff's having leave to draw on the bankrupts bills of a shorter date; and that condition not having been complied with, a right of action has accrued to the plaintiff to recover from the assignees the value of the bills which they have received.

LE BLANC, J. I consider the principle which governs this case as having been fully established in the cases of *Tooke v. Hollingworth*, 5 Term Rep. 215, *Bent v. Puller*, Ib. 494, and *Zinck v. Walker*, 2 Blac. 1154, and though there was a difference of opinion in the former case, yet that was not so much a difference as to the principle itself, as with respect to the application of it to the facts of that case. There does not appear to have been any transaction between these parties previous to the letter of the 17th of August 1799. We have therefore the commencement of the transaction, which enables us to discover better what the parties meant; and there can be no doubt upon that letter what was their meaning. The application was not to sell bills of long date for those of shorter date, but to place those long bills in the hands of the bankrupts upon condition of being allowed to draw short bills upon them. And though in their answer they use the term *discount*, yet they assent to the terms of the first letter, and use that word merely as a mode of ascertaining what they were to receive for the accommodation. The bills therefore having been deposited upon a condition, and that condition not having been complied with, and they remaining in specie in the hands of the bankrupts at the time of the bankruptcy, the plaintiff might have brought trover for them against the assignees; but they having parted with them and received the value, this action lies in lieu of the other to recover the bills.

Postea to the Plaintiff.

Stone qui tam v. Farey.

1 East, 554. June 18th, 1801.

An affidavit of excuse, however slight, for not proceeding to trial, is sufficient to discharge a rule for judgment as in case of a non-suit, in a qui tam as well as in any other action.

UPON a rule nisi for judgment as in case of a nonsuit for not proceeding to trial, an affidavit of the plaintiff's attorney was produced in answer, assigning as a reason for not going to trial, that he was not enabled to prepare briefs for counsel in time, on account of the plaintiff having been absent on a journey, and not having returned home till the day before the assizes; and therefore he was under the necessity of countermanding notice of trial: and

Best now offered a peremptory undertaking, which

Wilson for the defendant objected to taking, as this was a *qui tam* action, which the Court would not suffer to be kept hanging over the defendant's head upon such an insufficient excuse as this; of which there was no instance in the books, in the case of a *qui tam* action; though in other actions for the trial of rights between the parties such an excuse might be admitted. But

Lord KENYON, C. J. said, that there was no difference to be made in this respect between *qui tam* and other actions; the same rules of practice must govern both. To be sure, the excuse offered was slight: but almost any excuse upon affidavit was sufficient upon giving a peremptory undertaking. And he added, that he had heard Mr. Justice *Dennison* say, that he had never known an instance of an application to discharge such a rule on a peremptory undertaking being denied, where any affidavit was offered in excuse.

Wilson then agreed to take a peremptory undertaking to try, and the

Rule was discharged(a).

(a) Vide *Raynes q. t. v. Spicer*, 7 Term Rep. 178.

Harman v. Tappenden and fifteen Others.

1 East, 555. June 15, 1801.

An action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff; at least not without proof of malice.

THIS was an action on the case to recover damages, wherein the plaintiff declared, that whereas before, and at the time of the committing the grievance after mentioned, he held the office of one of the freemen of the company of free fishermen and dredgers of the manor and hundred of *Faversham* in the county of *Kent*, and derived from such office sundry great advantages, profits, &c. and whereas *J. Tappendan*, *W. Lightfoot*, *C. Thomas*, (defendants), and *T. Sneed* since deceased, at the time, &c. held the several offices of steward, foreman, treasurer, and book-keeper of the said company, &c. and the said *D. Stephen*, *J. Ward*, (and other defendants,) being freemen of the said company, were jurors at a certain court called a water-court, holden in and for the manor of *F.* aforesaid, on the 28th July 1798; yet the said *J. Tappenden* so holding the office of steward, and *W. L.* so being foreman, &c. and the said *D. S.*, *J. W.*, &c. being such freemen and jurors as aforesaid, contriving and wrongfully and unjustly intending to injure and damnify the plaintiff, and to disturb and disquiet him in the peaceable and quiet possession, &c. of his said office of a freeman of the said company, and to deprive him of the advantages, profits, &c. belonging and appertaining to him in right of such office, whilst the plaintiff so held and enjoyed his said office, and behaved himself well therein, viz. on the 28th of July 1798, at the said court then holden in and for the said manor, wrongfully, unlawfully, and unjustly, and contrary to the duty of their said several offices, did order and procure to be ordered in and by the said court, that unless certain forfeitures should be paid to the steward of the said court on or before the 4th of August then next, for the use of the lord, &c. the said plaintiff should, and he was thereby ordered to be disfranchised from being a free fisherman, &c. provisionally, during the then ensuing oyster season, and until further order of the said court: by means whereof the plaintiff was wrongfully, unlawfully, and unjustly removed from the said office of a freeman, &c. and disfranchised from being a free fisherman and dredgerman in the said manor, &c. until he was restored as after mentioned, and until the plaintiff, on the 23d of April 1799, applied to *B. R.* for and obtained a writ of *mandamus*, directed to the steward, &c. of the said company, to restore him, &c. or to shew cause to the contrary thereof, &c. yet the said steward, foreman, treasurer, &c. and the freemen of the said company not regarding the said writ, &c. did not proceed to restore the said plaintiff to the said office of freeman, but in their return to the said writ certified and returned certain causes wherefore they could not, &c. which causes having been adjudged by the said court insufficient in law, such proceedings were thereupon had in the said court, &c. that on the 13th of November, 40 Geo. 3., a peremptory writ of *mandamus* was issued(a), whereby the steward, &c. and freemen of the said company were peremptorily commanded to hold a court, &c. and restore the plaintiff to his said office of one of the freemen, &c. and the said steward, &c. in their return to the said writ, certified that they had, on the 18th of January 1800, held a court, &c. and restored the plaintiff to his said office, &c. By reason of all which premises the plaintiff for a long time, viz. from the 4th of August 1798

(a) That was the case of the *Faversham* Company reported in 8 Term Rep. 352, where the constitution of the company is stated, and the grounds on which the peremptory *mandamus* was granted.

until the 18th of *January* 1800, was deprived of great advantages and profits, &c. which would have arisen to him from his said office, &c. and particularly of a share of the privilege and emolument of laying and keeping oysters upon certain oyster grounds within and belonging to the said manor, &c. and of carrying on and exercising a trade in oysters in common with the rest of the freemen of the said company, which the plaintiff would have received and been entitled to if he had not been so removed, &c. and has also sustained great costs, charges and expences by means of the several proceedings in *B. R.*, and in procuring his restoration to his said office. The second count was nearly similar, the principal difference being that the restoration of the plaintiff to his office was stated to be on the particular day mentioned, without alleging that it was by means of the *mandamus*; to the plaintiff's damage of 2000*l.*

At the trial before Lord *Kenyon*, C. J. at the Sittings at *Westminster* after last *Hilary* term, the plaintiff, in order to shew the damage sustained by him, after proving that he was a freeman of the company, gave in evidence the custom of the company, that certain days are appointed for catching oysters, and the quantity allowed to be caught on each day is divided according to the number of the members belonging to the company, and the shares or stints of such as do not attend are appointed to be caught by certain others of the members, who allow them half the share so allotted to them. Thus, if *A.* be absent, and his share be allotted to *B.*, who fishes for him, *B.* is entitled to the whole of his own share, and to half of *A.*'s, *A.* being entitled to the other half. He also proved the order of amotion, in consequence of which he was prevented from exercising his right of fishing during the whole season. The order was as follows: "At a water-court held the 28th *July* 1798. Whereas at this court *M. Harman* has not paid the fines imposed upon him by a former order of this Court(a), and does refuse to pay the same in violation of his oath as tenant of this manor and hundred, and in direct opposition to the by-laws and orders of this company: it is therefore ordered by this Court, that unless the said fines be paid to the steward of this Court on or before the 4th of *August* next, for the use of the lord, &c. he the said *M. Harman* shall be and is hereby disfranchised from being a free fisherman and dredgerman of this manor, &c. provisionally, during the ensuing oyster season, and until further order of this Court. And it is hereby ordered, that application be made to the Right Hon. Lord *Sondes*, the lord of this manor, &c. to confirm this order of disfranchisement, according to the ancient laws and customs of this company." The plaintiff also gave in evidence the writs of *mandamus* and returns; and insisted further, that he was entitled to the costs and charges he had been put to in prosecuting those proceedings. But Lord *Kenyon*, C. J. was of opinion, that as the law had not given costs in this case, as it had in others(b), the plaintiff was not entitled to recover: and other objections being taken to the action, a verdict was taken for the plaintiff for nominal damages, with leave to the defendants to move to enter a nonsuit. Accordingly, in the last term,

(a) See the case of the Company of Fishermen of *Faversham*, 8 Term Rep. 352, whereby it appears that every person on his admission into the Company takes an oath to observe the customary laws, and to pay such fines as should be imposed upon him. That in 1748, an order was made by the Company that none of their members should buy or lay any oysters in certain places there mentioned within the manor and hundred, or within any creek or bank upon or near the *Kentish* shore, on pain of forfeiting 20*s.* for every offence to the use of the lord. That *Harman* in 1796, 7 and 8, laid oysters for his own gain within a bank on the *Kentish* shore, whereby he incurred three forfeitures of 20*s.* each. These facts were also referred to in the present case.

(b) The stat. 9 Ann. c. 20. provides, that if any issue be joined on such proceedings, (i. e. upon traverse of any material fact in a return to a *mandamus*), and a verdict be found, &c. or judgment given upon demurrer, or by *nil dicit* or want of a replication or other pleading, the party shall recover damages and costs, &c.

The Attorney-General (and with him *Mingay*, *Bayley* Serjt. and *Espinasse*) obtained a rule *nisi* for setting aside the verdict for the plaintiff and entering a nonsuit, or otherwise in arrest of judgment: and stated these objections: 1st, That the evidence of the order of disfranchisement, which was provisionally for the season, and subject to the further order of the Court, and to the confirmation of Lord Sondes, (of which latter there was no proof,) did not support the allegation in the declaration which stated such order without the conditional confirmation required. 2d, That the plaintiff had no individual interest in the profits of the fishery, but only as a member of a partnership, and consequently was not entitled to recover his proportion of such profits in an action at law, but must have recourse to equity. 3d. (Which went in arrest of judgment,) That the costs of the *mandamus*, were not recoverable, not being a case within the statute of *Ann* nor awarded by the Court in that proceeding. 4th, (which went also in arrest of judgment,) That no action would lie to recover damages against individuals, for acts done by them in their corporate capacity; and *non constat* but all or some of these defendants might have voted against the order of a motion.

The case came on in *Easter* term last, when *The Court* intimated very strong doubts on the last-mentioned ground, how far the defendants were answerable in damages in their private characters for acts done by them in their corporate capacity. And Lord *Kenyon*, C. J. said, that he entertained considerable doubt, notwithstanding what was said in *Rich v. Pilkington*, Carth. 171; and *Rex. v. Rippon*, 1 Lord Raym. 564: and added, that he had many years ago moved for a *mandamus* to the master and fellows of *Wadham* college, to compel them to put the college seal to a return which they were required to make, and to which Dr. *Windham* the master had great objection, with respect to the facts agreed upon by a majority to be returned; conceiving that he should thereby make himself individually liable to the consequences: but Lord *Mansfield* overcame his difficulty by an explicit declaration that what he thus did in his corporate capacity could not hurt him in his individual character. *Lawrence*, J. expressed the same doubt as to the maintenance of the action on the general ground: and observed, that it should at least have been charged and proved that the defendants in their corporate capacity had tortiously procured these acts to be done by the corporate body. But as it was here stated, it did not appear that these individuals had concurred in the act of disfranchising the plaintiff. The case was then directed to stand over to this term.

Erskine (and with him *Garrow*, *Gibbs*, *Wood*, and *Kyd*, were to have argued) now proceeded to shew cause, and began by stating the manner in which the right of fishery was exercised, in order to shew that after the quantity to be taken was previously ascertained, each member had an individual right to his separate share so ascertained, and did not hold it in partnership with the rest; and therefore, any act which deprived him of the profits of that share was injurious to him alone, and not to the rest; and consequently, he might maintain an action against the wrong-doers.

LORD KENYON, C. J. Have you any precedent to shew that an action of this sort will lie, without proof of malice in the defendants, or that the act of disfranchisement was done on purpose to deprive the plaintiff of the particular advantage which resulted to him from his corporate character? I believe this is a case of the first impression where an action of this kind has been brought upon a mere mistake or error in judgment. The plaintiff had broken a by-law, for which he had incurred certain penalties, and happening to be personally present in the court, he was called upon to shew cause why he should not pay the forfeitures; to which not making any answer, but refusing to pay them, the court proceeded, taking the offence *pro confesso*, without any proof, to call on him to shew cause why he should not be disfranchised; and they

accordingly made the order(a). This was undoubtedly irregular, but it was nothing more than a mistake, and there was no ground to impute any malicious motive to the persons making the order. As to the case of *Rich v. Pilkington* (this case was suggested from the bar) the action was for a false return. It was in truth to ascertain a civil right, and with a view to an ulterior proceeding, namely a *mandamus*, to establish that right. This action is to recover damages for a loss alleged to have been sustained by the wrongful act of the defendants.

LAWRENCE, J. There is no instance of an action of this sort maintained for an act arising merely from error of judgment. Perhaps the action might have been maintained, if it had been proved that the defendants contriving and intending to injure and prejudice the plaintiff, and to deprive him of the benefit of his profits from the fishery, which as a member of this body he was entitled to according to the custom, had *wilfully and maliciously* procured him to be disfranchised, in consequence of which he was deprived of such profits. But here there was no evidence of any wilful and malicious intention to deprive the plaintiff of his profits, or that they had disfranchised him with that intent, which is necessary to maintain the action. They were indeed guilty of an error in their proceedings to disfranchise him, in not going into any proof of the offence charged against him, but taking his silence as a confession. In the case of *Drewe v. Coulton*(b), where the action was against the mayor

(a) These facts appear at large in the *Faversham Company's* case before referred to.

(b) DREWE v. COULTON.

In an action against a returning officer for refusing a vote at an election of members to serve in parliament, malice must be proved as well as laid. *Seemle* that charging that the defendant knowing, &c. and *wrongfully* intending to deprive plaintiff, &c. hindered him from giving his vote, &c. is a sufficient allegation of malice.

DREWE v. COULTON, *Launceston Spring Amizes*, 1787, 1 cor. *Wilson, J.* This was an action against the defendant as returning officer of the borough of *Saltash* for refusing the vote of the plaintiff, as a burgage tenant, in an election of members to serve in parliament for that borough. The declaration stated the plaintiff's right as a freeholder, of a burgage tenement in the borough, and that the defendant, being mayor and returning officer, &c. knew, &c. and contriving and wrongfully intending to deprive him, &c. obstructed and hindered the plaintiff from giving his vote, &c. And the question was, Whether the owners of burgage tenements in the borough had a right of voting, or whether that right were confined to the freemen of the corporation? The case was very fully argued at the bar, by *Lawrence, Serjt. Jekyll* and *Dallas* for the plaintiff, and by *Morris, Rooke, Serjt. Bond*, and *Gibbs* for the defendant.

In the course of the argument,

Wilson, J. said; If a Justice of peace commit any error within his jurisdiction I know of no case where such an action will lie against him: As if he convict upon evidence which turns out not to be true, and an action of false imprisonment be brought against him, the conviction is conclusive evidence in his favour. As to the case of a revenue officer, he is a mere volunteer, and therefore he is liable for any mistakes he may make. But this is more like the case of a sheriff, who is a ministerial officer. If, for instance, a writ of *fi. fa.* be directed to him, he is bound to act; and when the property is disputed, if he return *nulla bona*, and happen to be mistaken in point of law, he is liable to an action for a false return. He then mentioned the case of General *Burgoyne*, which was an action on the statute of King *William* for a false return against the defendant Mr *Moss* as returning officer of *Pres-ton*, and was tried in the year 1768, at *Lancaster*, before *Bathurst, J.* It was there contended, that under the determination of the House of Commons(1) all the inhabitants had a right to vote, and therefore that that was presumptive evidence that the defendant had *maliciously* refused to receive the plaintiff's vote. But it appearing that from the time of that resolution till the time of the election the usage had always been consonant to the decision of the returning officer in that instance, without paying any regard to the resolution of the House of Commons, Mr. Justice *Bathurst*, before whom the action was tried, was of opinion that the evidence did not support malice; and the defendant obtained a verdict.

After the argument was concluded,

Wilson, J. said, I am now called upon to give my opinion, but I do not think it ought to

(1) About 1690.

of *Saltash*, who was returning officer, for refusing the plaintiff's vote at an election, which was claimed in right of a burgage tenement, *Wilson*, J. non-

be binding in a case which is confessedly new, except as *Ashby* and *White* may govern it; though I myself have a strong opinion. This is, in the nature of it, an action for misbehaviour by a public officer in his duty. Now I think that it cannot be called a misbehaviour unless maliciously and wilfully done, and that the action will not lie for a mistake in law. The case of the bridgemaster⁽¹⁾ is in point. In all the cases but the misbehaviour must be wilful, and by wilful I understand, contrary to a man's own conviction. Therefore, I think from the opening of the counsel this is not a wilful refusal of the vote. In *Ashby* and *White* I do not see any thing in Lord *Holt*'s opinion, as to its being wilful being a necessary ingredient in the action: but afterwards in entering the resolution of the Lords I find that they relied on that ground.

In very few instances is an officer answerable for what he does to the best of his judgment, in cases where he is compellable to act. But the action lies where the officer has an option whether he will act or not. Besides, I think that if an action were to be brought upon every occasion of this kind by every person whose vote was refused, it would be such an inconvenience as the law would not endure. A returning officer in such a case would be in a most perilous situation. This gentleman was put in a station where he was bound to act; and if he acted to the best of his judgment it would be a great hardship that he should be answerable for the consequences, even though he is mistaken in a point of law.

It was a very material observation by Mr. *Gibbs*, that the words of the resolution of the House of Lords in *Ashby* and *White* followed the words of the statute of *William III.* For if that statute were declaratory of the common law, as it purports to be, and an action would not lie at the common law for a false return, unless the return were proved to have been made maliciously as well as falsely, it should seem by a parity of reasoning that a person whose vote is refused by a returning officer cannot maintain an action against him, unless the refusal be proved to have been wilful and malicious. And if malice were necessary before the statute by the common law, and since by the statute which is declaratory thereof, to sustain an action for a false return, which includes perhaps the votes of all, it seems equally necessary in an action like the present where the injury complained of is to one only. If, however, on looking into the statute it appears to be an amendment of the common law, this argument will not hold.

I do not mean to say, that in this kind of action it is necessary to prove express malice. It is sufficient if malice may be implied from the conduct of the officer; as if he had decided contrary to a last resolution of the House of Commons: there I should leave it to the jury to imply malice. But taking all the circumstance of this case together, malice can in no shape be imputed to the defendant. The plaintiff may have a right to vote; but that depends upon an intricate question of law, with respect to burgage tenures; the right itself founded on ancient documents, and usages, and not acted upon for many years. On the other hand, there are three recent decisions of committees of the House of Commons in support of what the defendant has done: these to be sure are not binding; they may perhaps all be wrong; but they would naturally lead a person in the situation of this defendant to adopt the same opinion. He might fairly reason thus: that the persons who composed those committees were more likely to form a proper opinion upon the subject than himself; and that it was better to follow those determinations than to decide from his own judgment on a supposed right which had lain dormant for so many years; especially as all the evidence of that right was before the committees when they made their determinations. From these grounds, therefore, it cannot be inferred that the defendant has acted wilfully and maliciously in refusing the plaintiff's vote; and unless that be so, he is not liable in this action.

But notwithstanding the opinion which I hold, I must say that this is a new case; and I confess that the statute of *William* weighs strongly with me. If that be considered as declaratory of the common law, it is a confirmation of the case of *Ashby* and *White*. If so, this is an action maintainable by the common law; otherwise one species of this sort of action is maintainable by the common law, and the other not: but there seems to be no reason for such a distinction: and then in that case the common law requires malice to support the action as appears by the statute of King *William*.

But without determining whether the statute be declaratory of the common law or not; if it be not, this case rests on that of *Ashby* and *White*. Now all the debates and arguments in that case go upon the malice; and all those who have acted on that determination since have considered that the refusal must be wilful and malicious in order to support the action. So far it is an authority. It is true, that my Lord *Holt* did not form his opinion upon that ground; and he has stated the law differently: for he says that, if any person who has a right to vote be obstructed in his right, he may maintain an action against the person so ob-

(1) This and other cases Mr. J. *Wilson* read from *Buller's N. Pri.* p. 64. It is there said, that an action lies against a ministerial officer for wilful misbehaviour, as denying a poll for one who is a candidate for an elective office, such as bridgemaster, &c.

sued the plaintiff because malice was not proved: and he observed, that though Lord *Holt* in the case of *Ashby v. White* endeavoured to shew that the action lay for the obstruction of the right, yet that the House of Lords, in the justification of their conduct, supposed to be written by the Chief Justice, puts it upon a different principle, the wilfulness of the act, 2 *Lud.* 245. The declaration in that case was copied from the precedent in *Milward v. Sergeant*, which came on in this court on a writ of error, Hil. 26 Geo. 3, for refusing the plaintiff's vote for the borough of *Hastings*. There the charge was, "that the defendant contriving and wrongfully intending to injure and prejudice the plaintiff, and to hinder and deprive him of his privilege of voting, did not take or allow his vote." All which allegations Mr. Justice *Wilson* in the case above alluded to thought were essential to be proved in order to sustain the action.

Per Curiam,

Rule discharged(a)(1).

structing him. And that opinion has not been directly contradicted by any person. But that refusal was charged to be malicious: and it does not necessarily follow, that if it had not been wilful and malicious in the party that he would have holden that the action lay; however it may be inferred pretty strongly. Be that as it may, it was not the ground of the decision in that case. And in my opinion it cannot be said, that because an officer is mistaken in a point of law, this action will lie against him. That is indeed the case in criminal actions, for there ignorance of the law will not excuse; but the same rule does not prevail in civil cases. It has also been said, that this is not like a case where a burdensome office is thrown upon a man without his consent, wherein he is compellable to act; for that here the defendant has chosen to become a member of a corporation, by which he has put himself in a situation to become a returning officer, and therefore that he is bound to understand the whole law as far as it relates to his public situation, and is answerable for any determination he may make contrary to that law. But I much doubt whether that rule be generally true: and in the present instance I am clearly of opinion that the want of malice is a full defence. However, as no notice is taken of this in my Lord *Holt's* judgment, if my brother *Lawrence* is seriously of opinion that this action is maintainable without malice proved, I shall recommend to the other side to consent to have the question put upon the record.

Lawrence, Serjt. declining to pledge his opinion as to the point required.

Wilson, J. then nonsuited the plaintiff: and no new trial was moved for.

Lawrence, Serjt. said at the trial, that the declaration was copied word for word from that in the case of *Milward* and *Sergeant* a few terms ago, which stood for argument in the King's Bench after a verdict had been obtained against a returning officer for refusing a vote. In that case, Lord *Mansfield* and the Court of *K. B.* refused to hear any argument unless a distinction could be shewn between that case and the case of *Ashby* and *White*, saying that the question had already been determined by the House of Lords. Upon that occasion *Garrow*, who was one of the defendant's counsel, said that he thought that there was a very material distinction between the two cases, and that he meant to argue it on the ground of that distinction; which was, that the declaration did allege the act done to have been malicious. But *Ashurst*, J. then said, that the distinction was not well founded, for it was laid to be, "wrongfully intending to injure," &c. which was the same as "maliciously," &c. and therefore the plaintiff recovered.

(a) See the case of *Barnardiston v. Soame*, 2 *Lev.* 114, which was an action against the sheriff of *Suffolk*, charging that the plaintiff maliciously intending to deprive him of the office of knight of the shire, made a double return. Upon a trial at bar, *Twysden*, *Rainsford* and *Wylde*, Js. held, and so directed the jury, that if the return were made maliciously they ought to find for the plaintiff; which they did, and gave him 800*l.* And on motion in arrest of judgment, *Hale*, C. J. being in court, he, *Twysden* and *Wilde*, Js. held, that forasmuch as the return was laid to be *falso et malitiose et ea intentione* to put the plaintiff to charge and expence, and so found by the jury, the action lay. *Rainsford*, J. doubted. But notwithstanding this charge of malice judgment was reversed in *Cam. Scacc.* (vide 3 *Lev.* 30.); and that judgment of reversal affirmed in parliament. (1 *Lutw.* 89. 7 *St. Tr.* 481—452.) Lord C. J. *North's* first reason against the action was (7 *St. Tr.* 442.) because the sheriff, as to the declaring the majority is judge, and no action will lie against a judge for what he does judicially, though it should be laid *falso malitiose et scienter*. This reversal occasioned the passing of the statute 7 & 8 *W. 3. c. 7*, which gives an action against the returning officer for all false returns wilfully made, and for double returns falsely, wilfully, and maliciously made.

(1) [The same principle has been laid down in Massachusetts in the case of *Vose v. Grant*, 15 *Mass.* 505, and is indeed the only one which is consistent with the essential idea of a cor-

Peaceable on the Demise of Thomas Hornblower v. Thomas, John, and Samuel Read and John Pidduck.

1 East, 568. June 15, 1801.

One tenant in common levying a fine of the whole and taking the rents and profits afterwards without account for nearly five years is no evidence from whence the jury should be directed (against the justice of the case) to find an ouster of his companion at the time of the fine levied; and consequently the latter may maintain ejectment without making an actual entry.

THIS was an ejectment, tried before *Lawrence, J.* at the last spring assizes at *Worcester*, for one third part of the manor of *Shell, &c.*, upon a demise laid on the 2d of *May* 1796. On the trial the facts appeared to be these: *Philip Fincher* being tenant for life, remainder to his first and other sons in tail, remainder to his daughters as tenants in common in tail, &c. (who afterwards levied a fine,) died, leaving three daughters, *Mary* married to *Thomas Hornblower*; *Ann*, (still living) married to *Nicholas Pearsall*; and *Margaret*, who died unmarried before Mrs. *Hornblower*. *Mary Hornblower*, under her marriage-settlement, having a power to dispose of her share of the premises in question, executed it in favour of the right heirs of her husband after her own death, with a power of revocation. She survived her husband, and died on the 9th of *March* 1796. The lessor of the plaintiff claimed as heir at law of her husband, under her appointment. After her death, *N. Pearsall* and *Ann* his wife levied a fine of the whole estate, as of *Easter* term 1796, which commenced on the 13th of *April*. It was understood by the plaintiff before the trial, that the defendants meant to claim under a deed, or will, or both, of Mrs. *Hornblower*, executed subsequent to the deed of appointment before mentioned; in consequence of which the plaintiff's counsel produced evidence by anticipation, which went decidedly to prove that at the time and long before when the supposed instrument or instruments bore date, Mrs. *Hornblower* was insane, and consequently incapable of revoking the former appointment made by her when in her senses, and making a new disposition of her property. Whereupon the defendants' counsel, saying they were not then prepared to meet that case, stood upon their title derived from the fine operating upon what, they contended, was an adverse possession by *Pearsall* and his wife of the whole estate at the time of the fine levied. As to which it appeared in evidence, that during the life of Mrs. *Hornblower* the whole rent of the estate was paid to *Pearsall* in right of his wife, and that he settled with the other sisters for their shares; excepting once when *Pidduck* the tenant in possession paid the rent to Mr. *Hornblower* in his life-time in presence of *Pearsall*. And that since the death of Mrs. *Hornblower* and till *Pearsall's* death, which happened afterwards, the latter alone received the whole rent; and after his death the defendants (the *Reads*) received it; no rent having ever been paid to the lessor of the plaintiff: and no entry was proved to have been made by the latter. That in conversation between his attorney and the defendant *Pidduck*, the tenant in possession, about a fortnight before the trial, the latter said, that he considered the *Reads* as his landlords, to whom since *Pearsall's* death he had paid his rent, and that he did not hold under the lessor of the plaintiff. And on cross-examination, the attorney said, that he had understood from his client, the lessor, that the defendants had said that they claimed as having an exclusive right; but when this was said did not appear. For the lessor of the plaintiff it was insisted at the trial, that no

poration as heretofore constituted. The principle of express individual responsibility on the part of members of a corporation, by statutory regulations, is, of course, a different question. See also, *Franklin Ins. Co. v. Jenkins*, 3 Wend. 180.—W.]

entry was necessary to avoid the fine, he having been tenant in common with *Pearsall* during his life, and after his death with the defendants the *Reads*. That he might elect whether the receipt of rent by *Pearsall* and the defendants should be an ouster or not; and if he were not ousted, the fine would only operate on the title and interest of the defendants. *E contra* it was insisted that, as the lessor of the plaintiff was never in possession, this case was distinguishable from the common case, where several tenants in common being in possession, one of them levies a fine of the whole. And that here the possession being adverse from the death of Mrs. *Hornblower*, and no entry having been made, the fine was a bar to the plaintiff's recovery. The jury under the judge's direction found a verdict for the plaintiff; and leave was given to the defendant to move to enter a nonsuit, if the Court should be of opinion that an entry was necessary to avoid the fine. A rule *nisi* having been obtained for that purpose in the last term,

Onslow, Serj., *Dauncey*, *Wigley*, *Jervis*, and *Abbott* now shewed cause, and contended that no entry was necessary in this case. It is settled, that a fine levied of the whole estate by one of several tenants in common is no ouster of his companions, and in the case of joint tenant operates only as a severance of the joint-tenancy. *Ford v. Lord Grey*, 6 Mod. 44; Salk. 285. So in *Smales v. Dale*, Hob. 120, the entry of one tenant in common shall be taken generally as an entry for his companions as well as himself. The same law holds in the case of coparceners^(a); and in a note from Lord *Nottingham's* MS. to the last edition of Co. Litt., in which it is said, that when one coparcener enters specially, claiming the whole land and taking the whole profits, she gains her sister's moiety by abatement; the note (referring to the case of *Smales v. Dale*.) says, "the contrary is held, that one coparcener cannot be disseised *without actual ouster, and claim shall not alter the possession*." So a perception of profits by one tenant in common alone, without account, is no ouster of another; but there must be an actual disseisin strictly proved. *Fairclaim v. Shackleton*, 5 Burr. 2604. It is true that in *Doe v. Prosser*, Cowp. 217, uninterrupted possession by one tenant in common without account, and without any adverse claim for 36 years, was holden a sufficient bar to his companion, but there the jury had found an actual ouster by presumption from the facts proved. But here no actual ouster can be shewn at the time of the fine levied; and the jury by their verdict have negatived any presumption of the kind. Down to the time of Mrs. *Hornblower's* death, on the 9th of March 1796, she was in possession, and there was nothing to show an adverse possession by *Pearsall* from that time to the 13th of April when the fine was levied. In order to make a disseisin, it must not be such a possession which is at the election of the other party to consider so or not, Co. Litt. 330. b. (n. 1). A fine levied by a tenant for years is no bar without a feoffment. But some act must be done in all cases of a privity of possession to change the nature of that possession before a fine can operate against the owner. *Hunt v. Brown*, Salk. 340, and *Earl Pomfret v. Lord Windsor*, 2 Ves. 472—481.

Gibbs and *Williams*, Serj., in support of the rule, insisted that there was evidence that the possession of *Pearsall* was adverse to the lessor of the plaintiff at the time of the fine levied. He was in possession of the whole rent without account, and this has continued down to the present time. Then if this be not evidence of ouster, it will be difficult to say what is so, or where to draw the line. The lessor of the plaintiff himself considered the possession as adverse. He treated the defendant's claim as being derived under an instrument executed by Mrs. *Hornblower* before her death. And therefore, whether that were valid or not, at least it shews that the possession was adverse at the time of levying the fine. [*Lawrence*, J. observed, that the defendants gave no such instrument in evidence.] The instrument was assum-

(a) Co. Litt. 143. b. and vide *Doe v. Kean*, 7 Term Rep. 386.

ed to exist, and evidence given to invalidate it. The attorney of the lessor of the plaintiff swore, that his client knew from the defendants that the whole was claimed; and admitting this conversation to have been after the fine levied, still it serves to explain in what right the defendants then held the possession. All the cases where possession by one tenant in common has been holden to extend to the rest have been where all had once been in possession; but here the lessor was a stranger to the estate, claiming as a purchaser under the deed of appointment, and there never has been any acknowledgement of his title by those in the actual possession of the estate or of the rents. In the case of *Fairclaim v. Shackleton*, 5 Burr. 2604, both parties had been in possession of the rents and profits; and what was very material, on the death of one of the tenants in common, his son was admitted tenant on the court rolls. But the case of *Doe v. Prosser*, Cowp. 217, shews strongly, that though one come in by a rightful possession, yet if he afterwards hold adversely, he shall bar his companion by length of possession. Now the fine operates as much here after five years as the longer possession in that case operated in bar of the ejectment under the statute of limitations. Lord Mansfield there considered, that a denial of title, together with a refusal to account, would be sufficient evidence of an ouster by one tenant in common of another. And they cited 14 Vin. Abr. 512. *pl. 5. in margine.* Co. Litt. 243. *b.* 373. *b.* to shew, that an entry by one claiming the whole is an ouster of his companion. And *Story v. Lord Windsor*, 2 Atk. 631, to shew, that a fine and non-claim for five years will bar a co-tenant in common.

Lord KENYON, C. J. No person is less disposed than I am to accommodate the law to the particular convenience of the case: But I am always glad when I find the strict law and the justice of the case going hand in hand together. The whole of this defence is founded in a most unrighteous and fraudulent proceeding; and in order to give effect to it, the legal operation of the fine is insisted upon; and it is asked, if this were not an adverse possession by *Pearsall* at the time of the fine levied, where the line is to be drawn? I have no hesitation in saying where the line of adverse possession begins and where it ends. *Prima facie* the possession of one tenant in common is that of another: every case and *dictum* in the books is to that effect. But you may shew that one of them has been in possession and received the rents and profits to his own sole use, without account to the other, and that the other has acquiesced in this for such a length of time as may induce a jury under all the circumstances to presume an actual ouster of his companion. And there the line of presumption ends. In the case of *Doe v. Prosser*, Lord Mansfield rightly said, that it was not necessary to shew actual force in order to prove an ouster, as by turning a man out by the shoulders; but, as was also observed by Mr. Justice Aston, it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. There, there was an undisturbed and exclusive possession by one tenant in common for 40 years, which the court properly held to be sufficient evidence of an ouster to leave to the jury. But no judge could think himself warranted in directing a jury to make such a presumption in this case in order to work the grossest injustice, and in aid of a fraud. What is the case here? During Mrs. Hornblower's life *Pearsall* held as tenant in common with her; he received all the rent, but he accounted for her proportion. She died in the month of March 1796; the defendants or *Pearsall* having as is supposed, procured from her at a time when the jury have found her to be insane, an instrument conveying this property to them. Then in Easter term following, for the purpose of securing the possession of this illgotten property, the fine is levied. But *Pearsall* had then done no act which manifested that he held the possession of the whole adversely. The levying of the fine of the whole was no ouster of his companion. About a month intervened between the death of Mrs. Hornblower and the levying of the fine. What notice was there to the lessor of the

plaintiff at that time that *Pearsall* held adversely, so that he shall be taken to have acquiesced in his title. All the cases mentioned go upon the ground of acquiescence in an adverse holding in order to presume an ouster. In *Fairclaim v. Shackleton* there had been a perception of the rent by one tenant in common alone for 26 years; but the title of the other being admitted, no ouster was presumed. Without an ouster be found by the jury the possession of one tenant in common must be taken to be the possession of all. I do admit that upon the principle of the case of *Lade v. Holford*, Bull. Ni. Pri. 110, the jury may from circumstances presume an ouster, and where the fact is so found the legal consequences would ensue. But no judge would advise a jury to make the presumption in this case. Then, unless the holding were adverse, there was no occasion for an entry to avoid the fine. Suppose a tenant for years levied a fine, no entry by the landlord would be necessary in order to enable him to maintain an ejectment at the end of the term. In *Taylor d. Atkins v. Horde*, 1 Buri. 111-117, Lord Mansfield said, that in order to advance justice he would enable the real owner in such a case to consider himself kept out by wrong or not, at his election. So a tenant in common may rely on the possession of his co-tenant as his own, unless there be an actual ouster in fact, or the jury find it from circumstances. But nothing of that sort is here found; and therefore, we may consider the levying of the fine as rightfully and legally done, and intended to operate only on that share of the premises to which the defendants were lawfully entitled.

GROSE, J. The question is, whether there were an adverse possession in *Pearsall* at the time of levying the fine? Now to hold that would be to give effect to a scandalous fraud: therefore I will not presume it. Nothing appears to shew that he had then set up an adverse claim to the whole: nor will I presume that he had, since he must have known that any act done by Mrs. Hornblower in a state of insanity was a nullity, under which no title could be derived. So that there is no ground for saying that his possession was adverse at that time, and the jury by their verdict have negatived it.

LAWRENCE, J. Whether the defendants claimed under a deed or will of Mrs. Hornblower did not appear at the trial; but the plaintiff not knowing which it was, or at what time the supposed instrument was executed, said he should give evidence to shew that for a long period, which at all events covered the time within which either could probably have been executed, she was insane. But the fine was put in, which the defendant insisted was at any rate a bar to the action, as no entry had been made. That point I reserved for the opinion of the Court. Then the plaintiff produced his evidence of the insanity, which was proved most satisfactorily: to which the defendants said, that not being aware of such a case intended to be made, they were not then prepared to answer it, but would rely for the present upon the operation of the fine; but neither the contents of any will or deed were read or offered in evidence. I considered this as distinguishable from the common case, because the possession of one tenant in common was the possession of another, as the receipt of rent by one is a sufficient receipt by the other to prevent his being barred by the statute of limitations. This was holden in the case of *Coppinger v. Keating* on a writ of error from Ireland, M. 22 G. 3, in a case where one of two brothers professing the popish religion entered on the death of his elder brother upon lands of which they were tenants in common, in consequence of the gaveling act, directing that the lands of persons of that persuasion shall descend to all the males according to the custom of gavelkind, and held them for several years until his death: and the Court determined that the son of the elder brother was not barred by the statute of limitations, as the uncle was tenant in common with him under that act, no actual ouster being found. There was no act proved in this case to have been done by *Pearsall* at the time of the fine levied to oust his co-tenant, or to manifest that he held adversely to him.

LE BLANC, J. The question is, whether any act had been done previous to the levying of the fine, to shew that at the time of the fine levied the party in possession claimed adversely to the lessor of the plaintiff, or any circumstances had happened from whence the jury might presume an ouster of his co-tenant? The determination of this case in favour of the lessor of the plaintiff will not break in upon any of the cases, where it has been holden that length of time or receipt of rents by one tenant in common, in exclusion of another, may let in the presumption by the jury of an actual ouster of his companion. The lessor of the plaintiff was not entitled to any rent till after the death of *Mary Hornblower*, he claiming under an appointment to take place after her death. Up to the time of her death she was entitled, and there is no pretence to say that she was ousted by *Pearsall*. She died on the 9th (as it now appears) of *March*, and the fine was levied on the 13th of *April*. Then in order to shew an adverse possession within that period, it must either appear that *Pearsall* entered on her death claiming the whole, or that he did some act to shew that he claimed adversely. But there is no evidence of any act done for this purpose, and the only evidence of any adverse claim is what was said by *Comberbatch*, the plaintiff's attorney, on his cross-examination, that in a conversation with his client long subsequent to the levying of the fine, the latter told him that he understood that the defendants claimed the whole; but this is no evidence that they claimed adversely at the time of the fine levied. Therefore, the case is no more than this, that one tenant in common, without ousting his companion, or setting up any adverse claim, levies a fine of the whole in 1796, and afterwards receives all the rent. *Prima facie* the receipt of rent by one tenant in common shall be taken to be for all, and according to the right; and it rests upon him to shew that it was received for himself only. Of this there is no evidence. The levying a fine of the whole by one has been settled to be in itself no ouster of the other: and nothing appears to shew that at the time it was levied *Pearsall* claimed adversely to the lessor. Therefore, there was no evidence to leave to the jury from whence to presume an actual ouster at the time of the fine levied.

Rule discharged for entering a Nonsuit.

Rice v. Chute.

1 East, 579. June 16, 1801.

The captain of a troop for which forage is furnished by the orders of a clerk appointed by such captain is not liable in an action for money had and received for such forage, though present with the troop at the time; it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by Government, and upon whom the captain is entitled to draw for a certain sum regulated by the returns of the preceding month.

THIS was an action for goods sold and delivered, and for money had and received, tried at the last assizes for *Horsham* before *Heath, J.* The plaintiff's demand was for forage supplied by him at different times to the *Hampshire Fencible Cavalry* at *Brighton* from the 15th of *October* 1799 to *May* 1800; and the only question was, Whether the defendant were liable for it? *Reed*, the quarter-master of the troop, said, that he was appointed by the defendant to be clerk of the troop at the salary of 10*l.* a-year. He proved the amount of the oats delivered by the plaintiff to the use of the troop, and that the oats were delivered according to the orders of the defendant as commanding officer of the troop, the same having been purchased by the witness by the express direction of the defendant. That *Hunt* was the paymaster of the troop for the last two years and a half; and that he the witness had paid the plaintiff several sums by bills on the paymaster. The plaintiff received orders to draw bills on *Hunt*, and was paid at different times by him. The plaintiff

and others who supplied the troop were to be paid monthly, but *Hunt* had not paid at all since *October 1799*. The drafts were of this sort: "*27th January 1800*. Two months after date pay *John Rice* or order 316*l.* value in oats by *Alexander Reed*;" addressed to *W. Hunt*, Esq. and accepted by him. In the latter end of *October 1799*, the defendant was recruiting at *Basingstoke*, and came to *Brighton* on the 8th of *November* following. The defendant was in *Brighton* for three or four weeks, and was detached to *Arundel* in the *December* of the same year. About *24th January*, the defendant returned, and staid at *Brighton* till his regiment was disbanded. *Hunt* was appointed paymaster in 1797 by the commander in chief. He had been slack in his payments for some time, and at last absconded; which was the occasion of the present suit. The witness had received orders from the defendant to draw bills on the paymaster and on his agent too, which were paid. Evidence was also given of bills drawn by the defendant on the paymaster in favour of various persons who had furnished articles for the troop. At *Brighton* the clerk drew bills as usual for the defendant, and received money for a long time after the new regulation (in *July 1797* as to the appointment of the paymasters) both from the defendant and from the paymaster. The clerk applied twice by letter to the defendant at *Arundel* and *Brighton* for money for the use of the troop. He also proved, that *Hunt* the paymaster was indebted to the defendant in 400*l.*, and the regiment was indebted to *Hunt* in 700*l.* That *Hunt's* credit was so bad that no person would have trusted him for 20*l.* Before the new regulation the colonel appointed the paymaster, and the officers were liable for his deficiencies. By the new regulations the commander in chief appoints the paymaster, and the field officers and captains are no longer responsible. However, the same practice continued after as existed before this regulation, namely, that the captains of each troop drew on the paymaster bills for the pay, forage, and quarters of the troop. The two sureties for the paymaster *Hunt* were Colonel *Dacre* and Colonel *Everitt*. For the defendant it was proved, that on the 8th *October*, the defendant was recruiting at *Basingstoke*, and remained there till the 3d of *November* following. He was at *Brighton* on the 10th of *November*, and on the 24th of the same month. That from 1st of *December* to the 19th of *January* he was with a detachment at *Arundel*. He was there likewise on the 28th of *January*, and staid till the 2d of *February*, and then had leave of absence. He was at *Brighton* on the 1st of *March*. That on the 20th of *February*, *Hunt* absconded. That the lieutenant next in command, in the absence of the captain of the troop, signs the accounts and payments, and the pay list, containing the extra food to the horses. On that return the paymaster issues the money. The pay list is the voucher of the last issue. There was a committee of paymasters, whereof the defendant was one, after the absconding of *Hunt* who regulated the accounts. The counsel for the plaintiff, admitting that there was no express undertaking for the payment, contended that he was entitled to recover on the count for money had and received; relying on the state of the paymaster's accounts as proved by *Reed*. The learned Judge directed the jury to find the verdict for the defendant, but they found a verdict for the plaintiff to the extent of his demand. And a rule nisi having been obtained for a new trial,

Adam and *Marryat* shewed cause, and contended that this case differed from *Myrtle v. Beaver*, ante, 135, which was an action of the same kind; for there the defendant the captain of the troop, for which the goods were furnished, was absent from his troop the whole time on duty in another quarter, and another officer exercised the command and gave the orders for the supply. Whereas here the defendant was present in command from time to time, and actually gave the orders to the clerk of the troop whom he had appointed, and whose duty it was to provide the necessary forage. [Lord *Kenyon* observed, that the plaintiff had taken damages for his whole demand,

including articles furnished while the defendant was absent. But the counsel offered to deduct so much as the particular articles amounted to.] They then renewed the same arguments as were before urged in the case referred to, in order to shew that the captain or commanding officer of the troop was the person liable to answer such demands: and they added, that the paymaster was no more than the banker to each captain for the appropriated sum for which each was entitled to draw upon him after it was issued by government.

Shepherd, Serjt. and *Harrison*, contra, were stopped by the Court.

Lord KENYON, C. J. To be sure this case is different in the respect mentioned from the case referred to. But I cannot conceive how the captain of a troop can be personally responsible for the forage furnished to the troop, whether he have received any money for that purpose or not. It is admitted, that the goods were not furnished upon his express undertaking. They were ordered by the clerk, who receives his orders from whatever officer happens to be in the command at the time. But it is notorious to all parties, that he does not contract as an individual, but on the behalf of government. And government, it appears, provides money for this very purpose, which is issued from time to time to the paymaster of the regiment. The parties who furnish the goods know that the money is not come out of the pocket of the captain of the troop(1). Then the paymaster not having paid this money over to the defendant, how can we say that the money has been had and received by him to the plaintiff's use, when no money whatever has been received by the defendant. The consequence is, there must be a new trial.

Rule absolute(a)(2).

(1) Most of this class of cases turn upon a question of fact, Whether the defendant contracted with the officer upon his *personal* responsibility; or upon the responsibility of the principal. This, in *M^r Williams v. Willis*, 1 Wash. 199, which was an action of *indebitatus assumpsit* for the use and occupation of a racefield, it appeared that the defendant was treasurer of a society called the *Jockey Club*, and hired the race-field, of the defendant for the use of the Club, but bound himself personally to perform the agreement. It was held that he was liable. So in *Sheffield v. Watson*, 1 Caines 69, which was *assumpsit* for labour and materials in making two drafts and models for a frigate, at the request of the defendant, who was navy agent of the general government, and publicly known to be such, the court inferred from the nature of the transaction that it was the understanding of the parties that the defendant should be personally liable, and accordingly subjected him. But in *Hogsdon v. Dexter*, 1 Cranch 845. 865, the court regarded the contract as entered into with a view entirely to government, and therefore held that its obligation was on the government only. On the same principle it was held in *Bainbridge v. Downie*, 6 Mass. Rep. 253. that the commander of a gun-boat in the service of the *United States* could not maintain an action in his own name against a surety for a seaman enlisted on board of such vessel; but that the remedy was exclusively in the name of the *United States*.

(a) There was another case of *Rice v. Everitt*, determined at the same time, which was an action brought by the same plaintiff against the colonel of the same regiment for forage furnished to his own particular troop. The evidence was in general the same as in the other case: But here it appeared that though the defendant had not drawn upon the paymaster of the regiment for the particular sum in demand, and so he could not be said to have received that sum to the plaintiff's use; yet the defendant being indebted to the paymaster on the balance of his own private account with him to the amount of two thirds of the plaintiff's demand, and being also surety for the paymaster to Government, and the paymaster having absconded in a state of insolvency, the Court refused to set aside a verdict recovered by the plaintiff for the amount of his debt, as the defendant was liable in some shape or other for the paymaster's default, and justice had upon the whole been done by the verdict.

(2) [The Supreme Court of Pennsylvania have held that there can be no recovery against a public officer, on his public contract, except on the most clear and satisfactory evidence of an absolute and unqualified engagement to be personally answerable. *Cook v. Irvine*, 5 S. & R. 497. Nor does the circumstance of a disbursing officer of the State having received money and erroneously paid it to another person than the plaintiff, render the officer liable to an action. *West v. Jones*, 9 W. 27.

The same principle is to be found in the New York cases. *Fox v. Drake*, 8 Cowen, 191. *Osborne v. Kerr*, 12 Wend. 179.—W.]

The King v. John Gilbert.

1 East, 588. June 17, 1801.

Indictment for engrossing a great quantity of fish, geese, and ducks, held bad, without specifying the quantity of each.

AN indictment charged that the defendant on, &c. at, &c. did ingross and get into his hands by buying of and from divers persons unknown a great quantity of fish, geese, and ducks, to the intent to sell the same again; to the evil example, &c. and against the peace, &c.; and being removed by *certiorari* into this Court, the defendant demurred generally; and objected, amongst other matters, that no quantity was specified of the several articles charged to be engrossed.

Wood (being called upon to support the indictment) referred to *R. v. Tracy*, 6 Mod. 32, where it was said by *Powell*, J. that an indictment for engrossing *magnum quantitatem frumenti* was holden good; and this is recognized in 1 Hawk. c. 80. s. 22. *Sed*

Per Curiam. There are many authorities(a) to shew that this form of indictment is bad: it includes several things, as fish, geese, and ducks, without ascertaining the quantity of each.

Gurney in support of the demurrer.

Judgment for the Defendant.

The King v. Munday and Others.

1 East, 584. June 17, 1801.

The objects of a charitable foundation in the actual occupation of the alms-house and lands for their own benefit in the manner prescribed by the rules of the institution, and liable to be dismissed for any breach of such rules, are rateable in respect of such occupation.

JOHN MUNDAY and several others named appealed to the quarter sessions of the county of *Essex* against a rate made for the relief of the poor of the parish of *Felsted* in that county. The Sessions confirmed the rate, subject to the opinion of this Court on the following case:

Richard Lord Rich having founded a corporation in the parish of *Felsted*, in the county of *Essex* for the relief of the poor there, called *chaplains, parochians, and wardens of Felsted*, and having endowed them with certain lands for that purpose, and for the support of a school therein, by indenture dated the 27th of September 7th of Elizabeth, granted to the corporation and their successors a messuage called *Colliers*, situate in *Felsted*, and twenty acres of land, with a wood of four acres in the said parish: and likewise the rectory of *Braintree* in the said county; for certain uses to be declared by the said Lord *Rich* in a certain indenture. Lord *Rich* accordingly by indenture, dated the 28th of December in the same year, reciting the former deed, and that he had appointed for ever the said messuage for an alms-house, for the only relief, dwelling, habitation, and lodging of five poor, old, weak, impotent, or lame persons, as well men as women, and also for one grave woman to attend them, each to be nominated and placed from time to time by him and his heirs, and there to remain during their natural lives, to the intent that they the said five poor alms-folks for the time being should daily come to church, &c.; ordained and declared, that there should be and continue from time to time in the said messuage five such poor men and women, &c. and one grave woman to attend them, and to prepare their meat and drink, &c.; which said six persons should

(a) Cro. Car. 381. *Anon.* an indictment for engrossing *magnum quantitatem straminis et feni* was quashed, for not mentioning how many loads of each. So for selling *diversas quantitates* of beer. *R. v. Gibbs*, 1 Stra. 497, and *vide* 2 Hawk. ch. 25. s. 74.

have freely during their lives their dwelling chambers and lodging in the said alms-house, with such relief, profit, and necessities, and in manner and form as should be therein declared. It was further declared, that Lord *Rich* and his heirs should be perpetual patrons of the foundation. And that if any of the six persons should die or be justly removed, then Lord *Rich* and his heirs should appoint and place one other man or woman of the sort aforesaid in their place, in manner and form as the persons so dead or removed had possessed or enjoyed: and in default of such appointment by Lord *Rich* or his heirs, the chaplain and church-wardens of *Felsted* for the time being should appoint for that turn only. It then gave the patron upon report of the chaplain or churchwardens, a power of removal in certain cases of misbehaviour, or in case of wilful wasting of the property, or conveying it away, or upon marriage, or keeping any children in the said house. And further it was declared, that the said five poor alms-folk and woman attendant should possess, enjoy and use from time to time for ever, by the sufferance and permission of the said chaplain, parochians, &c. such several lodgings in the said alms-house freely and quietly as to every of them from time to time were appointed by the patron, &c.: and also should possess, use and enjoy all together, by the said permission, the hall, kitchen, buttery, cellars, barns, &c. and all profits and commodities to the said alms-house belonging. And that the said chaplain, parochians, &c. should from time to time permit the said five poor folk, &c. to have, hold, use, possess, and enjoy their several dwellings, and the said hall, kitchen, &c. and all other the said profits, and also further to have, occupy, and use the said two crofts, pastures, tythe hay, and the said wood specified in the said deed of the said 27th September, 7th of Elizabeth, with such kine and cattle, with the increase of the same, as the said five poor alms-folk, &c. for the time being should bring up upon the same, in manner and form as Lord *Rich* should order: and also should permit the said five, &c. for their fuel, to be spent in the said alms-house for their relief, as well to bake, &c. and to prepare meat, &c. and other necessities convenient for their relief; to take, cut down, and carry away to the said alms-house for the causes aforesaid, to their use and profit yearly, one rood of the said wood called *Enfield's Wood*, to be spent only on the said alms-house; and also to lop, crop, and shred the growing in or upon the premises, without felling any oaks, ashes, &c. or other trees above the growth of 25 years, except they be rotten, without hindrance, let, or interruption of the said chaplain, parochians, &c. Lord *Rich* also ordained, that the said five poor folk for the time being (or in their default, the said chaplain, parochians, &c. out of their wood) should yearly fence and preserve the said rood of wood, to be so felled and carried away, at their own proper costs and charges. Lord *Rich* also gave to the said five poor folks and woman six good kine, to be used and employed to and for their relief, (out of which the stock was to be kept up for ever,) by the advice of the chaplain and wardens, and of the farmer of the manor of *Felsted* for the time being. And he directed that the said poor should yearly sell one cow of the said kine to their only use, profit, and commodity, to be employed to their better and further relief; and also yearly bring up one cow-calf for the increase of their said flock; and further, that the said poor alms-house folks, &c. should be ordered and governed in all things by the advice and consent of Lord *Rich* and his heirs, (or in their default by the chaplain and wardens, &c.) not repugnant to any article, &c. in these presents. And if any of the said poor folks or women would not be ordered and governed in form aforesaid, they should be removed and put out from his or her room and place, lodging and living, &c. as if the party so refusing were dead. But their several payments of money to them they were to use and dispose of at their own pleasure without control.

The appellants, being such poor, old, weak, impotent, and lame persons, were regularly appointed to the said charity, pursuant to the said deed of the 29th

of December 1565. The rate in question, dated 16th December 1800, was as follows :

Messrs. *Munday, Low, Drakenwood, Hicks, Beeze, and Thorp.*

The Alms-house	}	Total Rental.	}	£. s. d.	
and				2 5 0	
Lands.				£. 15 0 0	

At the time of the rate being made they were in the occupation of the said messuage called *Colliers*, and the said twenty acres of land and four acres of wood ground in *Felsted*, conveyed by the deed of the 27th September, 7th of Elizabeth, and paid a labourer for making hay and cutting their wood, and disposed of both to their own use. They also kept six cows upon the same lands, weaned a calf, and sold a cow every year, according to the directions in the said deed of the 29th of December; and of the other calves and of the milk they disposed at their own pleasure. At the time at which the appellants were appointed they were not parishioners of *Felsted*. The premises are of the annual value at which they are rated, and were never rated before. The visitor of the said alms-house has frequently granted additional relief to the said appellants.

Pooley and Bosanquet, in support of the rate, contended that the alms-house and lands, being themselves rateable property, were liable by the express provision of the stat. 43 Eliz. c. 2. s. 1, to be rated in the hands of the *occupiers*, if any such there were; provided it could be shewn, according to the construction which had been put upon that statute, that the persons rated were in the beneficial occupation of the property on their own account. Lord *Holt* said, Salk. 527, that "hospital lands were chargeable to the poor as well as others: for no man by appropriating his lands to an hospital could exempt them from taxes to which they were subject before, and thereby throw a greater burthen on his neighbours." In *R. v. St. Luke's Hospital*, 2 Burr. 1053. 1 Blac. 249. S. C., there was no doubt made but that the property itself was rateable, provided *an occupier*, in the sense before described, could be found. But Lord *Mansfield* shewed, 1st, That the trustees could not be considered as such, because they had no beneficial interest in it, and were mere instruments of conveyance. Nor, 2dly, the *servants* attending the hospital, they not having *separate and distinct apartments* assigned to their use, as in the case of *Chelsea Hospital*(a), and other charitable foundations. Nor, 3dly, the unhappy objects of the charity. The same determination was made in the case of *St. Bartholomew's Hospital*, 4 Burr. 2435. And again, in *R. v. Waldo*, Cald. 358, the defendant, who had placed ten poor children in a house belonging to him, and employed a woman there as a servant to superintend and instruct them, was holden not rateable in respect of such property, inasmuch as he made no profit of the building, but applied it solely to charitable purposes. All these cases went upon one or other of these principles, either that the parties rated were not the *occupiers* of the property, which is necessary within the letter of the statute of Elizabeth to make them rateable; or they were not the *beneficial* occupiers, and were therefore not within the spirit of the law: for where no profit is derived from the occupation, it is the same as if there was no occupier. Other cases have been decided on the same principles. The Master and Fellows of *Catherine Hall Cambridge*, Cowp. 79, were holden rateable for buildings occupied by the servants of the college for their benefit, although that is in truth a charitable foundation. So the lessee of a private building appropriated to be used as a chapel, *Robinson v. Hyde*, Cald. 310, making a profit of it in that shape, was deemed rateable in respect of such profitable use. In like manner, a royal park, though not rateable while in the possession of the crown, yet becomes so in the hands of the ranger(b),

(a) *Vide Eyre v. Smallpace*, 2 Burr. 1059.

(b) *Lord Butz v. Grindall and another*, 1 Term Rep. 328.

by whom it is made profitable. But stables rented by the colonel of a regiment for their use are not liable to be rated, 2 Term Rep. 372, because there are no beneficial occupiers. In *R. v. Hurd*, 3 Term Rep. 497, however, a master gunner having the exclusive occupation (of all but one room) of a battery-house, though removable at the pleasure of the crown, and so far a stronger case than this, was deemed liable to be rated in respect of such exclusive occupation. And *Ashurst*, J. there said, that if any officer of an hospital hold any part of the hospital lands for his own convenience, he becomes rateable in respect thereof. In *R. v. Susannah Field*, 5 Term Rep. 587, though the defendant was found by the Sessions to be the occupier, yet that was merely as a conclusion of law, which they meant to submit to the judgment of the Court upon the facts stated; and there it appeared that she was merely employed as a servant by the *Philanthropic Society* to superintend the education of the children there; that she had no distinct apartments besides her bedroom, and was not allowed to have any person there with her; that she was removable at the pleasure of her employers, and in short had no beneficial occupation in her own right, but merely as a servant. But in *R. v. Catt*, 6 Term Rep. 332, where it was shewn that a schoolmaster, who had a similar employment under a charitable trust, had the exclusive possession of a house where he and his family resided, and the use of a garden, the Court had no doubt but that he was liable to be rated for them. Now here there is an actual occupation of the property rated by the objects of the charity for their own benefit. They pay the labourer whom they employ, and they dispose of the produce to the best advantage for themselves. They manage the property within the limits of the trust reposed in them in the same manner as a tenant does under the term of his lease. If the property were leased to a tenant under the same terms, reserving to themselves the rent, there could be no doubt but that such tenant would be liable to be rated: then the equitable owners must be equally liable if they occupy it themselves instead of receiving the rent. This case is stronger in support of the rate than *R. v. Hurd*, before mentioned; for these persons are not mere tenants at will; they cannot be turned out without some misconduct or breach of the rules prescribed to them. Each has an exclusive right to his own separate lodging-room, and the rest they hold as tenants in common. There is no more reason in law for exempting them from being rated than the masters and fellows of colleges, which are charitable institutions. It might as well be contended that if any individual held an estate by the gift of another from motives of charity, he would not be liable to be rated for it. No exception of this sort is introduced into the stat. 43 Eliz.: and where the legislature intended to exempt this species of property they have done so in terms, as in the land-tax acts in certain cases.

Trower and *Wingfield*, contra, said, that this was the first instance of an attempt to rate the objects themselves of a charity; and though the express point had never been judicially decided, yet in all the cases which had occurred of hospitals and other charitable institutions, it had been assumed as an incontrovertible position that the poor persons themselves for whose benefit the property was appropriated were not liable to be rated. The non-existence, therefore, of such a species of rating furnishes a strong argument against the adoption of it. Then what is there in the present case to distinguish it? The poor persons have indeed separate lodging-rooms; but that was the case of *S. Field*; 5 Term Rep. 587, and every thing else is occupied by them in common, as in all other hospitals and almshouses. They have not an exclusive possession of the land; for if they omit to do what is required by the trustees or the charter of their institution, the trustees are to do it for them. They are liable to be turned out for any misconduct or disobedience of the orders of the patron or trustees, and also for the breach of other positive regulations. It is true, that this property falls within the general description of rateable property in the statute 43 Eliz., but there are several necessary ex-

ceptions not included in the words of the statute, which have always been admitted, such as lands in the possession of the crown, the scites of hospitals and the like under the superintendence and mangement of the trustees. Another necessary exception is where such property is managed by the poor objects themselves under the control of the founder or trustees. For the primary object of that statute was to make persons of ability contribute to the necessary maintenance of the poor : therefore, where property is altogether devoted to this purpose, it is absurd to require that a part of it should be so appropriated. Persons of this description can never be considered as having that ability to provide for others which the statute was intended to enforce. It is true, that such lands in the hands of tenants are rateable, because the occupation of a tenant is necessarily supposed to be a beneficial occupation, and the tax is therefore levied upon his personal gains, and not upon the fund appropriated to the charity. For this reason, it is admitted that the same lands in the hands of the trustees, who themselves derive no profit, are not rateable. Then what difference can there be whether the trustees receive the profits in the first instance and apply them to the relief of the objects of the charity, or whether these latter gather the profits themselves, accountable to the trustees for the due application of them. The benefit is not greater to them in the one instance than in the other ; and therefore, the rating them because they are beneficial occupiers, instead of beneficial receivers, is a distinction in sound and not in substance. The case of the servants or officers of charitable institutions who have distinct occupation of apartments or lands for their own benefit is very different ; for they are not the objects of the charity, and therefore theirs is properly speaking a personal beneficial occupation ; and like the case of a tenant the tax is levied upon their individual ability in respect of such benefit, and is not withdrawn from the objects of the charity. But every tax drawn from the poor persons themselves defeats its own object, and must be reimbursed to them again in another form. The case of colleges and other like foundations have no similitude in their objects to charitable institutions for the sustenance of the poor and impotent. They have other more varied and extensive objects, and partake more of the nature of political corporations. They are not appropriations of property in aid of the stat 43 Eliz. like the present institution, or like hospitals, to which this has the nearest affinity. Here it is expressly found that these persons are real objects of charity ; and so far from being able to contribute relief to others have stood in need of it themselves beyond what the institution affords them.

Lord KENYON, C. J. The Sessions have told us what the custom has been with respect to rating these persons for the property in question, an inquiry which I should not have thought it material to make : for the only matter we are called upon to decide is, as to the meaning of the statute of Elizabeth. Neither is the wisdom or propriety of rating these persons to be considered : nor should I have advised the parish officers to do so ; because it is probable that what they take from them in one shape must be returned in another. But the case being here, we can only deal with it as the law has pointed out to us. The words of the statute 43 Eliz. c. 2, are general ; the rate for the relief of the poor is to be levied upon *every occupier of lands, houses, &c.* There is no exception made of hospital or other lands devoted to charitable purposes : and I was anticipated from the bar in an observation which occurred to me to arise from comparing that statute with the land-tax acts, that where the legislature intended to exempt property of this description, they have done so in the latter in express words. When the statute of Elizabeth was passed, poor rates had not grown to that calamitous size which we have seen them reach in our time ; and parishes have not been accustomed to draw any aid from small properties : but now contribution is looked for from every species of property liable to be rated, without regard to what has

been done before. It is admitted here, that the property itself comes within the general description of rateable property in the statute; and the only question is, Whether these persons can be said to be occupiers of it for their own benefit. Now what does the case state? These persons plough, and sow, and reap, and have every sort of occupation in fact which any other person can have: and all this for their own benefit. If this be not an occupation within the statute, I know not how far the exemption claimed may extend. Surely the smallness of the benefit cannot constitute an exemption. Suppose an hospital endowed with lands for a certain number of persons who have a provision there. At first, perhaps, it might only have afforded a small pittance to each of the members. Shall it be said that they were not rateable then, and would only become so when the revenues were increased: where is the line to be drawn? But supposing that in time it afforded an income of 70*l.* or 80*l.* a-year to each individual: shall it be said that they are not bound to contribute any thing, because they derive that benefit from a charitable institution? Then it is said, that cases have decided that property of this kind is not rateable, because no occupier could be found: but no case has decided, that where persons are found in the actual occupation and having a beneficial enjoyment of it, they are not within the statute.

GROSE, J. It is not the question whether it were wise or meritorious to rate these poor objects; but the overseers have a right to insist that they come within the description of persons liable to be rated by the stat. 43 Eliz.; that is, that they are beneficial occupiers of lands and houses; and if they do so, we cannot say that they are not rateable. But it is asked, Where is the case which says that persons who are the objects of a charity are rateable? I could put many cases where they ought to be rated. For instance; suppose a person gave 1000*l.* a-year amongst five persons, who were to be selected as being objects of charity; should they not be rated on that account? I remember when the case of the Bursar of *Catherine Hall*, *Rex v. Gardner*, Cowp. 79, was decided. He was contended not to be rateable; but it was determined otherwise. Yet he was an object of charity in one sense, being appointed to a situation in a charitable foundation; and I cannot distinguish upon a question of law between one sort of charitable foundation and another. As to the quantum of the rate, it is a matter for the Sessions to determine.

LAWRENCE, J. I am of opinion, that under the circumstances of this case it is a good rate. The distinction has been truly taken upon the cases, that wherever persons have been found in possession of property from whence they derived a benefit to themselves, they have been holden rateable as occupiers. And all the cases which have been decided against the liability to be rated have either been upon the ground that the party rated was not the occupier, or if he were, that he derived no benefit to himself. But it is said, that the objects themselves of a charity, though beneficial occupiers, do not come within the meaning of the stat. 43 Eliz., for that the object of the rate directed to be levied by that statute is for the relief of poor and impotent persons, and consequently it could not be intended to levy the rate upon such. But however the persons rated might have been poor and impotent at the time when they were selected as objects of the charity, yet after their appointment to be members of the foundation they ceased to be of that description of persons, and therefore became rateable in proportion to the property so acquired.

LE BLANC, J. The only question here is, whether the Sessions have rated persons in possession of rateable property. There is no doubt but that the property is rateable within the stat. 43 Eliz. &c; and without relying on the fact found of these persons being the actual occupiers, I think sufficient appears from the other facts of the case for the Court to say that they are properly to be considered as occupiers. They occupy the property for their own benefit; and whether it be more or less beneficial is not an object for our inquiry. In

other cases of this sort the endeavour has been to find out whether the persons rated were in the occupation of the property ; or if so, whether they occupied it for themselves or merely as agents or servants for others, deriving no benefit from it themselves. Such were the cases of the hospitals, and such was the case of Mr. *Waldo's* charity ; and in the last-mentioned case the Court considered that he was not the occupier. But these persons are in the actual occupation of rateable property ; and there is no exemption in their favour in the stat 43 Eliz. : nor is there any case which has decided that persons of this description occupying such property for their own benefit, shall not be rated. Therefore, whether the benefit be more or less, we must say that they are liable to be rated in respect of the occupation of such property.

Order of Sessions confirmed.

The King v. The Inhabitants of Aldborough.

1 East, 597. June 17, 1801.

The occupation of a cottage for 40 days by the leave of the former tenant, who then went out, who under an agreement with him to pay the same rent to the landlord which he had before done, but without any authority from the landlord, (the cottage together with other premises occupied at the same time being 10*l.* a-year and upwards,) was holden to give the occupier a settlement.

TWO justices by an order removed *R. Hall*, together with his wife and children, by name, from the parish of *North Walsham* to the parish of *Aldborough*, both in the county of *Norfolk*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on the following case. *Hall* the pauper, being legally settled in *Aldborough*, rented and occupied a public house in *North Walsham* from the 10th of *October* 1798 till the 12th of *December* 1800, at the yearly rent of 9*l.* On the 10th of *October* 1800, by virtue of an agreement with *Slap*, who was tenant of a cottage in *North Walsham* belonging to Mr. *Barcham*, *Hall* entered and occupied the cottage, which *Slap* then left, to which *Hall* brought part of his furniture, and where he occasionally resided till he was removed. *Hall* agreed to pay the same rent as *Slap* had paid, which was 2*l.* 12*s.* 6*d.* per annum. *Slap* had no authority from *Barcham* to let this cottage, nor did he know any thing of this agreement. *Barcham* was applied to by *R. Hall* on the 8th of *November* 1800, when *Barcham* agreed that *R. Hall* should be tenant of the cottage, provided that one *Money* to whom he had previously agreed to let it did not take it, which *Money* declined ; and *Hall* continued in the cottage as tenant to *Barcham*, and was to pay him the same rent of 2*l.* 12*s.* 6*d.* from *Michaelmas* 1800.

Hulton was about to contend in support of the orders, on the ground that the pauper's possession of the cottage was merely as a wrong-doer, by connivance of the former tenant, whose term was expired, and without any authority from the landlord. But

The Court thought the case too clear for argument ; and that the pauper gained a settlement by his occupation of more than 10*l.* a-year at the time for forty days. And Lord *Kenyon* said, that nothing appeared of the former tenant's term having expired, and the law gave him authority to assign his interest ; and the pauper did occupy above 10*l.* a-year.

Dayrell, contra.

Both Orders quashed(a).

(a) Vide *R. v. Netherseal*, 4 Term Rep. 258.

The King v. The Inhabitants of Over.

I East, 599. June 17, 1801.

A pensioner of the *East India Company* hiring himself as a servant for a year, with a reservation to himself of two days in each half year when he might go for his pension, cannot gain a settlement by service under such a contract.

TWO justices by an order removed *J. Rutter* and *Hannah* his wife from *Hemmingford Abbots* in the county of *Huntingdon*, to *Over* in the county of *Cambridge*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on a case, stating, That the pauper *Rutter* let himself two days after *Michaelmas* 1799 for a year to *William Dare* of *Over*, at the wages of six guineas; but that being a pensioner of the *East India Company* he was to have two days in each half year to himself, to go to *St. Ives* to receive his pension. He remained in his said service till old *Michaelmas* day 1800, being a *Saturday*, when his master went to him in the field, and asked him if he would stay again. The pauper said he wanted more wages; he should expect seven guineas a year; which his master refused to give. His master then asked him whether he intended to go to *St. Ives* fair that day? The pauper said he did. He then unyoked his horses and went to the fair, where his master paid him part of his wages. On the next day (*Sunday*) the pauper returned to his master at *Over*: on that day he settled his wages, when his master asked him if he would stay again, which he assented to. The pauper then let himself to *Mr. Dare* again for another year at the wages of six guineas; but the pauper expressly said he should expect to have the two days in each half year to go to *St. Ives* for his pension as before; which his master consented to. He continued with *Dare* under this second hiring for about eleven weeks, when the pauper was apprehended for a bastard child. His master settled his wages, and the contract for the service was dissolved by mutual consent. The Sessions were of opinion that the pauper's hiring and service with *Dare* at *Over* were effectual to gain him a settlement there.

Bevill, in support of the orders, said, that the Sessions have in effect found that this was a dispensation of the service for the two days, and not an exception in the original contract; and contended that this case was governed by the principle of the militiaman's case, *R. v. Winchcombe*, Doug. 392, who was deemed to gain a settlement notwithstanding an express exception at the time of the hiring that he should be absent on duty for a month. If that were such a reasonable cause of absence, as that the master could not have refused his consent for the party to be absent from his service while engaged on duty in the public service, it seems to be equally reasonable that one who has received a pension for the reward of past services should be at liberty to go and obtain his reward, although he had not stipulated for it: and then the stipulation to do that which the law would otherwise have allowed him to do upon a general contract, without any such exception, will not vary the case or defeat the settlement. Supposing a servant hired himself for a year, reserving liberty to go to church on *Sundays*, that would not be considered as an exception in the original contract, but a necessary and implied dispensation by law.

Lord KENYON, C. J. said, there was no colour for contending the pauper gained a settlement by this hiring and service. The case of the militiaman went altogether upon the ground that the leave of absence stipulated for was no other than what the law would have compelled without any such stipulation. It was part of the public service. No conclusion, therefore, can be drawn from thence in support of this settlement. Here was an express exception of four days in the year, during which the pauper was not to be under

the control of the master. An express reservation of *Sundays* out of the original contract of hiring was considered sufficient in *R. v. Macclesfield*, Burr. S. C. 458, to prevent the gaining of a settlement under it.

Per Curiam,

Both orders quashed(1).

Wilson was to have argued against the orders.

The King v. The Inhabitants of Wantage.

1 East, 601. June 17, 1801.

A master stipulating for 4d. out of every 1s. of the earnings of his apprentice is no benefit to him within the stat. of *Anne*, for which an additional duty is to be paid; being by law entitled to the whole.

TWO justices by an order removed *Thomas Smart* from *Wantage* in the county of *Berks* to the parish of *St. Peter* and *St. Paul* in the borough of *Marlborough*, in the county of *Wilts*. The Sessions on appeal quashed the order, subject to the opinion of this court on the following case: *Thomas Smart*, the pauper, being settled in the parish of *St. Peter* and *St. Paul* in *Marlborough*, was bound apprentice to *Mr. Tuck*, rope-maker in the parish of *St. George's Ratchiff Highway, London*, for the term of seven years, and served there for eighteen months. The indentures were lost; but parol evidence being admitted, it appeared, that the pauper was to find himself in clothes, board, washing, and lodging: that the master was to allow him full journeyman's wages, but was to have four-pence out of every shilling of the pauper's earnings. The indentures were stamped; but no duty was paid for any consideration reserved to the master.

Gibbs and *Const* were to have argued in support of the order of Sessions.

Rose, contra, intimated that the 4d. reserved out of every shilling of the pauper's earnings was a benefit to the master, for which there ought to have been an adequate stamp under the stat. 8 Ann. c. 9, and 9 Ann. c. 21. But

Lord KENYON, C. J. said, it was impossible to argue that a part of the apprentice's earnings reserved to the master was a benefit to him within the meaning of the statute, when by law he was entitled to the whole, and might rather be considered to have given up that part which he did not reserve than to have acquired any thing.

Per Curiam,

Order of Sessions confirmed(a).

Harris and another v. Calvart and another, Bail of Cooper.

1 East, 603. June 17, 1801.

Where the defendant was sued by original in *London*, the *scire facias* against the bail must be sued out there also: and it does not help the plaintiff who sued out the *scire facias* in *Middlesex* that the bail had by mistake been put in there.

UPON a rule for the plaintiff to shew cause why the proceedings should not be set aside for irregularity, &c. the facts were, that the defendant *Cooper* was sued by original in *London*; and *non est inventus* being returned to the first *capias ad respondendum* in *London*, the defendant was afterwards arrested on an *alias capias ad respondendum* in *Middlesex*, and bail were put in with the filazer in *Middlesex*. Final judgment being afterwards entered in *Hilary* term; and a *scire facias* sued out in *Middlesex* against *Cooper's* bail, the present defendants;

(1) Vide *The King v. Rushulme*, 10 East, 325.

(a) Vide *Rez v. The Inhabitants of Leighton*, 4 Term. Rep. 732.

Barrow objected on behalf of the bail, that the *scire facias* ought to have been sued out in *London*, where the original action was.

The *Attorney-General*, contra, said, that the bail ought not to be permitted now to avail themselves of their own error, the *scire facias* having been sued out in *Middlesex* because the bail were put in there. But

The *Court* (after consulting the *Master*) said the proceedings were irregular. The bail ought to have been put in in *London*; and having been put in in *Middlesex*, it was the same as if no bail at all had been put in, and the plaintiff might have proceeded against the sheriff for that default. The plaintiff, therefore, has been guilty of an irregularity in having proceeded to judgment before there was in strictness any appearance entered: and at any rate, he cannot proceed against the bail upon a *scire facias* in *Middlesex* which there are no prior proceedings to warrant.

Rule absolute(a).

Edwards and Others v. Sherratt.

1 East, 604. June 18, 1801.

The defendant a common carrier to and from *B.* through *W.* to *R.* employs distinct boats to carry to and from *B.* to *R.* and to and from *B.* to *W.* which pass on different days. The plaintiff knowing this, and having corn at *W.* which is threatened to be seized by a mob, writes to defendant at *B.* to send a *private* boat quickly on account of the state of the country, to take the corn to *B.*, to which the defendant not returning any answer, and plaintiff fearing to wait till the day the defendant's boat would in the usual course of employment go from *W.* to *B.* stops the boat passing by from *R.* to *B.*, and without disclosing the circumstances to the boatman prevails on him to take the corn on board, and then dispatches him forward in the night, having privately sent orders to open the lock at any time when he should pass. After a verdict for the defendant negating that the corn was delivered in the usual course of dealing as a common carrier; held that the verdict might be sustained, either on the general ground of fraud in the plaintiff, or on the circumstances of the case, furnishing altogether evidence of a tacit stipulation on the part of defendant to do the best he could, but not to be answerable as a common carrier for the violence of the mob; or because it did not appear that the boatman, whose ordinary employment was between *R.* and *B.* had authority from the defendant to accept the goods at *W.* for *B.*, much less to accept them in that manner. Where a plaintiff has closed his case in evidence at the trial, and the defendant has entered on his defence, it is discretionary in the judge whether he will let the plaintiff into other evidence on a collateral point which was not in controversy between the parties, in order to carry a verdict against the merits of the principal question.

THIS was an action on the case, in the common form, against the defendant as a common carrier by water from *Wolverhampton* to *Birmingham*, for negligently carrying a quantity of wheat belonging to the plaintiffs, whereby it was lost, and also upon the money counts; to which the general issue was pleaded. At the trial before *Rooke, J.* at the last *Stafford* assizes, it appeared that the wheat in question had been lodged at the warehouse of *Bickley and Co.*, who were wharfingers at *Wolverhampton*, for the use of the plaintiffs who resided at *Birmingham*. The defendant was a common carrier by water between *Birmingham* and *Wolverhampton*, and so on to *Radford*, which lies beyond *Wolverhampton*; but the carriage of goods between *Birmingham* and *Radford* and *Birmingham* and *Wolverhampton*, was conducted by different boats. During the late times of scarcity there had been a disposition to riot at *Wolverhampton*; the mob had actually pulled down a corn mill there, and a rumour was spread of their intention to go to the warehouse of *Bickley and Co.*; whereupon their managing clerk wrote a letter to the defendant to send an extra boat for the wheat as *quickly and as privately* as he could on account of the state of the country. He received no answer to his letter; but on *Monday* the 29th of *September* 1800, finding a boat of the

(a) Vide *Wharton v. Musgrave*, Cro. Jac. 381; and *Yates v. Plaxton*, 8 Lev. 235.

defendant's which had been to *Radford*, or somewhere beyond *Wolverhampton*, and was then returning empty by the latter place in its way back to *Birmingham*, he caused it to be stopped for the purpose of taking a quantity of the wheat on board; and *Green* the boatman making no objection to the proposal, 166 bags of wheat were put on board for the plaintiffs, and also some flour for a Mr. *Allen* at the same time from the same wharf. The bags were put on board *in open day*; and the wharfinger's clerk gave no particular directions to the boatman: but he had sent *privately* to the lockmen to have the lock ready to let the boat have a free passage *at any time* the boatman chose to go off with the boat; and in fact the boat went away between 8 and 9 o'clock at night on the same *Monday*. It further appeared, that the usual days for the defendant's boats to go from *Wolverhampton* to *Birmingham* were *Tuesdays* and *Fridays*: and this was not one of those boats, but used as a common boat from *Radford* to *Birmingham*. There was another boat loaded with corn from the same warehouse which went in company at the same time. Some part of *Allen's* flour arrived safe, for which the defendant charged a freight; but the 166 bags of wheat belonging to the plaintiffs were seized by the rioters at the distance of four or five miles from *Wolverhampton*, and never came to the hands of the plaintiffs, for which no charge of freight was made, but demurrage was claimed for the time the boat was detained by the rioters, which the plaintiffs refused to pay. The plaintiffs' counsel having closed their case, and the counsel for the defendant having begun to address the jury, the learned Judge, whose opinion was in favour of the defendant, stopped him by stating that impression, and that in his opinion the principal question for the jury to decide was, *whether the bags were put on board according to the usual course of dealing with a common carrier?* The plaintiffs' counsel then for the first time stated, that the defendant had received some money which the mob had paid for the corn seized by them, and which it was contended that the plaintiffs were entitled to recover on the money counts. The learned Judge, however, was of opinion, that as the plaintiffs had come there to try the question how far the defendant was liable as a common carrier, (and it appearing that there really was no dispute as to the payment of this money, which had been lodged in a banker's hands for the use of the owners whenever they thought proper to claim it,) and that this was only an afterthought to carry a verdict and the costs, the evidence ought not to be admitted in that stage of the cause. Thereupon he directed the jury as before mentioned; telling them that if they thought the goods were put on board out of the usual course of dealing with a common carrier, they ought to find a verdict for the defendant, which they did accordingly. A rule *nisi* was obtained in last *Easter* term for setting aside the verdict, and granting a new trial, on the ground that a common carrier contracting to carry goods for hire is by law answerable for all damages, unless happening by the act of God or the king's enemies.

Garrow, *Dauncey*, and *Ryder* now shewed cause against the rule. It was a question of fact for the jury whether under the circumstances of this case the wheat was accepted by the defendant as a common carrier. There was a known course of business in which the defendant contracted to carry goods for the public. There were distinct boats which passed at stated times to and from *Wolverhampton* and *Birmingham*, and to and from *Radford* and *Birmingham*: but considering the state of the country at the time, it would not have answered the plaintiffs' purpose to have waited for the regular conveyance. The wharfinger's clerk, therefore, who must be taken to be their agent, wrote to the defendant to send an *extra* boat *privately* for the purpose of removing the corn, which was in danger from the mob. This shews that the plaintiffs did not consider that they were dealing with the defendant as a common carrier; for this mode of conveyance was required as a favour; and if

the defendant had refused it, no action would have lain against him upon the custom of the realm for such refusal. But before any answer was returned to this proposal, the wharfingers got the consent of a boatman belonging to the defendant to do an act, not within the scope of his ordinary authority, to make use of the defendant's boat, not then employed by him in the course of public carrying from the place where the wheat then was, but out of the usual course of dealing as a common carrier, as the jury have found : and this too done secretly and by night. There was, therefore, no contract at all between these parties, but certainly not with the defendant as a common carrier. The danger was so great, that the defendant would have been justified in refusing to take the corn at all, much less out of his regular course of dealing. This, therefore, at most was a special acceptance on the part of the defendant by his servant to do the best he could for the plaintiffs ; and therefore he would not be answerable except for any malfeasance or gross neglect of his own.

Gibbs, Benson, and D. Jones in support of the rule. There was no evidence to shew that the defendant stipulated to take the corn in any other character than as a common carrier. The difference of the day or the difference of the boat cannot vary the question. The goods were conveyed by one of his boats passing by to the ordinary place of its destination. The defendant was a common carrier from *Radford*, as well as from *Wolverhampton* to *Birmingham*. The boat was passing by *Wolverhampton* in the usual course of navigation, and it must be taken that the boatman was authorized to take in whatever goods were offered to him to carry in the track which he followed. Suppose the same proprietor drove a coach from *York* to *London* though *Stamford*, and another coach from *Stamford* to *London*, if goods were taken in at *Stamford* by the *York* coach for *London*, it would be no answer to an action against him as a common carrier for the loss of the goods, that he did not contract to take goods from *Stamford* to *London* by the *York* coach as a common carrier, but that there was another coach employed for the particular purpose on another day, by which the plaintiff ought to have sent the goods. Besides, this was not a special contract with the plaintiffs to let them have a boat for the carriage of their goods in particular ; but the goods of another person were taken on board in the usual course at the same time. Where a person who is a common carrier receives goods for the purpose of conveying them in the ordinary track of his carriage, it must *prima facie* be taken that he received them in the character of a common carrier, and it lies upon him to shew that he received them under a special contract : and as there was no evidence of this, the learned Judge was not correct in leaving it as a question to the jury, whether the corn were put on board the boat according to the usual course of dealing with a common carrier. The only questions for the jury were, whether the defendant were a common carrier between *Wolverhampton* and *Birmingham*, and whether he received the goods at *W.* to carry to *B.* The rest was a conclusion of law. And it is against the policy of the law to admit implied exceptions in a contract, where the law imposed a general responsibility. At any rate, however, the plaintiffs were entitled to recover on the money count for the value of the corn received from the mob.

LORD KENYON, C. J. The case has a good deal of novelty, and perhaps there are some difficulties in it : but the present impression of my mind is with the defendant. The learned Judge summed up to the jury all the circumstances of the case ; and he left it to them to say from those circumstances, whether the corn had been put on board the boat according to the usual course of dealing with a common carrier : and if done out of that usual course, they were to find for the defendant. That I think was a right direction, and that it was properly a question of fact for their decision ; and with their decision I am not disposed to find fault. I will not break in upon the law as long ago settled, that a common carrier warrants the safe delivery of goods in all but the

excepted cases of the act of God or of the king's enemies. And I lay no stress in this case on the goods being sent from *Wolverhampton* on one day instead of another, or by one boat instead of the other which was the common boat. But I rely on the great features of the case; and thus it stands: The plaintiffs had certain agents at *Wolverhampton* with whom this corn was deposited in order to be sent to *Birmingham*. There was a great disposition to riot manifested in the neighbourhood on account of the prevailing scarcity; and the mob had pulled down a corn mill not far distant, and it was understood that they had threatened to come to the warehouse where this corn was deposited. The agents alarmed wrote a letter to the defendant, desiring him to send an *extra* boat for it as quickly and as privately as he could. No answer was returned to this; but with the impression that the corn was unsafe where it then was, and that it would fall into the hands of the mob, the plaintiffs' agents, finding one of the defendant's boats going by, without any intention of staying at *Wolverhampton* or seeking to take in goods there, stop the boat, and prevail on the boatman to take in this corn; and it is afterwards sent away by night in an unusual manner, a person being sent privately to give directions for opening the lock at whatever time the boatman chose to pass. To me there is fraud apparent on the face of the transaction; and that is the main ground on which my opinion proceeds. All the circumstances and urgency of the case should have been disclosed to the boatman at the time, and he should have been asked whether he chose to undertake the risk. Common honesty would have suggested this. For no man in his senses would under these circumstances have taken the corn under a liability as a common carrier. And if the cause had been tried before a jury of merchants at *Guildhall* they would not have hesitated a moment to say, that the whole was a rank fraud against the defendant; and I should have felt myself bound to tell them that such was my opinion. I think, therefore, that the learned judge who tried the cause did right: he leaned to the opinion that this was not a transaction in the common course of trade; but he left it to the jury to draw their own conclusion from the evidence: and I am satisfied with their verdict. As to the evidence offered on the money count, it came too late after the plaintiffs had closed their case: and under such circumstances they ought not to be let into the proof.

GROSE, J. This would have been a hard case no doubt to have holden the defendant liable to make good the loss; but still if the jury had drawn a wrong conclusion there must have been a new trial. Two grounds have been made in support of the rule; one, that the defendant was liable on the money count, which I shall at once lay out of the question. I think the judge in the stage of the cause in which it was offered did right in rejecting the evidence. The other ground is, that the judge misdirected the jury in telling them that the question was, Whether the corn had been put on board according to the usual course of dealing with a common carrier. But I think the direction was proper. It is admitted, that if it were not the intention of the parties to contract with the defendant as a common carrier, or if there had been a particular stipulation on his part that he should not be liable for the kind of damage which happened, that he would not be liable in this case. Now either this was a case of fraud upon the part of the plaintiffs, which cannot be enforced in an action upon a contract; or it was a contract under such circumstances existing at the time as must necessarily be taken to have included a tacit stipulation that the defendant should not be considered as a common carrier: and it was a question for the jury whether the plaintiffs contracted with him in that character or not. But that in effect is the same question as the learned Judge put to them in other words. Then what are the facts? A boatman in the night, out of the common course of his business, not on the usual day, or in the common boat, is induced to take goods on board, under such circumstances as if the defendant had been apprised of them it is clear that he would not have

contracted to receive them as a common carrier. It comes, therefore, either to a question of fraud, or to a question of intention, in what character the defendant contracted. And the jury have found that it was not the intention of the parties to contract with the defendant as a common carrier, but that there was a tacit stipulation under all the circumstances of the case that he should not be answerable for any damage which might arise from the mob, without which no reasonable man would have undertaken for the carriage of the goods. The direction was right, and the verdict is according to the truth and justice of the case.

LAWRENCE, J. I think the Judge's direction was right on this ground, that the jury were to decide whether *Green* the boatman acted under the proper authority of his employer when he took the corn on board? And I think the different circumstances of the case shew that he was not so acting. It was his proper duty to receive goods at *Radford*, and convey them to *Birmingham*. It does not appear that he was in the habit of stopping at other places by the way in order to take in goods; if it had, that might have been evidence of his having such general authority: but it does not appear that he had such an authority. And at a place where it was not in the usual course of his employment to stop, he stops and takes in goods which are afterwards lost. The only doubt on this part of the case is, that the defendant received freight for other goods which were put on board at the same time; which was evidence to shew that the boatman had such an authority. But still the verdict of the jury may be right, in concluding that the boatmen had not an authority to take in goods at unusual times: and to carry in the night, when the risk was much greater than in the day-time; and when in case of a loss of this sort by robbery the defendant could not recover over against the hundred. It does not appear, therefore, under the circumstances, that the boatman acted under the authority of the defendant in what he did by the procuration of the plaintiffs' agents. Then again, those agents wrote a letter to the defendant desiring him to send a *private* boat for the wheat; he was to send it, as privately as he could on account of the state of the country. To this no answer appears to have been returned. That shews that the defendant declined the undertaking to carry the wheat; and he might have sent orders to his agents to that effect. After which, the plaintiffs' agents, without any communication to *Green* of any of these circumstances, stop his boat as it is passing by, and having put the corn on board, send it off in the night in the manner described; and it not appearing that in so doing he acted under the authority of the defendant, I cannot say that the verdict is wrong; especially in a case where it cannot be doubted that the action is a harsh one; the country being in such a state at the time as greatly to increase the risk beyond the ordinary rate of compensation.

LE BLANC, J. Two questions have been made; 1st, Whether the question stated were properly left to the jury? 2dly, Whether the Judge did right after a trial on the main question and the plaintiffs had closed their case, to refuse to let them in to additional evidence upon a collateral point, which the parties did not come to try, and which was only thought of when the plaintiffs found that the Judge's opinion was against them on the main point. Upon the latter ground I have always conceived that it is a matter of discretion in the Judge, after the plaintiff has closed his case and the defendant's counsel has begun his address to the jury, to permit the former to go into a new case. And I see no ground to complain of the exercise of that discretion in the present instance. On the principal ground, whether the fact were properly left to the jury; whether the bags were put on board according to the usual course of dealing with a common carrier: if the boatman on board of whose boat they were loaded was not authorised at the time by the defendant to take goods on board from *Wolverhampton*, then they were not put on board in the usual course of dealing. Now it does not appear that the *Radford* boatman who re-

ceived them was used to stop at intermediate places to take in goods, or to take up goods at *Wolverhampton* for *Birmingham*, there being another boat employed expressly for that purpose. It does not appear that the defendant ever employed him for that purpose. That brings it to the question, whether *Green* the boatman had any authority to take the goods, which was proper for the consideration of the jury. For though a servant employed to carry goods from one place to another may ordinarily be presumed to have authority to take up goods in the course of his passage through intermediate places; yet where it appears that one servant was employed expressly for the purpose of taking goods from *Wolverhampton* to *Birmingham*, and another with the like employment from *Radford* to *Birmingham*, if the latter take up goods at *W.* for *B.* he does it without authority, and his master would not be liable. This was a question for the jury to decide under all the circumstances(1)(2).

Burrows v. Wright and another.

1 East, 615. June 18, 1801.

Where a mob attacked a baker's house and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves below the marketable value, held this was evidence for the jury of a felonious beginning to demolish the house, &c. within the 4th section of the Riot Act; and that the plaintiff might recover for the damage done to the house in an action against the hundred on the 6th section, but not for the value of the flour so sold, that not being consequential to the act of demolition. Nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house on the opposite side of the street, of which the lock only was burst; that not being a beginning to demolish, &c. within the act, with the view with which it appeared to have been done.

THIS was an action against the hundred on the stat. 1 Geo. 1, st. 2, c. 5, s. 6, for reparation in damages on account of rioters having pulled down in part the plaintiff's dwelling-house; and a second count for beginning to pull down an outhouse. At the trial before *Graham, B.* at the last *Nottingham* assizes, it appeared that on the 2d of *September* last, in the middle of the day (during a time of scarcity) upwards of an hundred persons assembled together came to the plaintiff's house, who was a baker, and asked if he had any flour; and being answered in the affirmative, they said they would have it at 2s. a stone. (It being then worth about 5s.) The plaintiff said he could not afford it at that price; but they insisted on having it; and he not able to resist began to measure it out in small quantities. The rioters then began to break the windows of the bakehouse, and the dwelling-house adjoining thereto, and broke the glass of three windows and also the shutters. Besides which they broke open a warehouse belonging to the plaintiff situate lower down in the same street on the opposite side of the way, in which there was flour. There however they only burst open the lock, and threw about three bags of flour worth 15*l.* into the street, from whence it was carried away by some of the mob. They took about ten stone out of the bakehouse, which was sold at the price named by themselves. They also took away some malt and other things. The learned judge told the jury, that there was no doubt of the unlawfulness of the assembly. And as to their beginning to demolish or pull down the dwelling-house, that the glasses of the windows and the shutters, if fixed, were part of the dwelling-house: nevertheless, if they were satisfied that the mob meant to stop there and proceed no further, it might be too much to say that it was a beginning to demolish, &c. within the statute.

(1) In an action against a lighterman in the common form for negligence, Lord *Eldon* held, that to entitle the plaintiff to recover, it must appear that the loss happened by the neglect of the regular and common duty of the defendant, *Whalley v. Wray*, 3 Esp. Rep. 74.

(2) [See *Story* on Bailments, 3d Ed. §. 508. ch. 6. p. 512.—*W.*]

But if they thought that the mob came with an intention to proceed to further acts of demolition if they could not otherwise effect their purpose, then it was a beginning to demolish, &c. within the meaning of the act, and consequently that the plaintiff was entitled to recover. The jury found for the plaintiff to the amount of all the damage proved.

Clarke and Reader, in the last term, obtained a rule *nisi* for setting aside the verdict and granting a new trial, on two grounds ; 1. That there was no evidence of an intention in the mob to pull down or demolish the house, although the windows and shutters were broken ; the object being evidently to obtain the flour to be sold at a cheaper rate than before, and not to destroy the house. And they cited *Reid v. Clarke*, 7 Term Rep. 496, where the violence offered to the house was much greater than here ; but the occasion being to compel the plaintiff to illuminate his house on the news of a victory, the Court held that not to be a beginning to demolish or pull down, &c. within the statute, 1 Geo. 1, st. 2, c. 5. But 2dly, at any rate, the damages were taken for too much : for the violence done to the outhouse or warehouse (mentioned in the second count) on the opposite side of the street was a distinct act from the other. There was no connexion between the two ; and there the only evidence of force was the bursting the lock ; but that could not be said to be a beginning to demolish, &c. within the act. There was no felony committed there ; the flour was thrown into the street. These grounds were again enforced in this term.

The Attorney General and Vaughan, Serjt. now shewed cause ; and insisted that the object of the rioters being to commit a felony in taking the flour from the owner against his consent, and having for that purpose actually committed a breach upon the house, in breaking the windows and shutters, and being only stopped from further violence by obtaining the object of their unlawful pursuit, clearly brought the case within the 4th sect. of the riot act, and consequently enabled the plaintiff to recover within the 6th section. Then with respect to the second objection ; all the damage which ensued was consequential to the beginning to demolish, &c. It was one continued act. And they referred to *Wilmot v. Horton*(a), where it was considered that this branch of the statute was remedial, and that the hundred were liable not only for goods and furniture destroyed in the house at the time of the riotous demolition of any part of the house itself, but that also damages done to the garden at the same time were recoverable. So this was but one beginning to demolish, &c. and not several beginnings.

Lord KENYON, C. J. In the case of *Wilmot v. Horton* the damage to the garden was immediately consequential to the pulling down part of the house, and happened in the act of pulling it down. But here the damage done at the warehouse on the opposite side of the street was an entire distinct act, not consequential to the other ; and it would be carrying the construction of the statute too far to say that a bursting open of a lock upon such an occasion was a beginning to demolish the house. But with respect to the dwelling-house and bakehouse adjoining, the case seems to me to have been properly left to the jury. It was for them to consider *quo animo* the windows and shutters were broken. The case of *Clarke v. Reid* turned on the *quo animo* the act was done. The violence there was to make the party illuminate, and could not have constituted the persons assembled rioters within the 4th clause of the act, which creates the felony. But

All the Court thought that the flour which was compelled by the mob to be sold was not a damage which could be recovered by the plaintiff against the hundred. Wherefore

The plaintiff consenting to take his verdict only for the damages done

(a) Cited in *Hyde v. Cogan*, Doug. 701, n. 3.

to the house by breaking the windows and shutters, it was agreed that the

Rule should be discharged(a)(1).

Heard, Assignee of Watts a Bankrupt v. Wadham, Executor of Wadham.

1 East, 619. June 19, 1801.

A. covenants that he will, on or before a certain day, convey to B., by such conveyance as B.'s counsel should advise, ALL the ground before conveyed to him by C., in consideration of which B. covenants to pay a certain sum, and reserve certain rents, &c. to A. and to lay out a certain sum on the premises; held that A. cannot maintain covenant against B. without averring such a [conveyances of parts in fee-farm] conveyance, or a readiness to convey to B. on or before the day all the land, but that B. prevented him by some act or neglect of his. And it is not sufficient to maintain covenant to shew that after the day B. accepted a conveyance of ground-rents in lieu of part of the land, and accepted that and the conveyance of the other part in lieu of the conveyance covenanted to be made by A.; for this is a substitution of a different agreement by parol, to which the covenant does not apply.

IN covenant, the plaintiff declared, that whereas by a certain deed of agreement made between *Watts* before he became a bankrupt on the one part, and *Wadham* the testator in his lifetime, and *T. Stevens* on the other part, viz. on the 18th of *May 1792*, *Watts*, for the considerations therein mentioned, covenanted that he would, *on or before the 18th of June* then next, grant and convey to *Wadham* and *Stevens*, their heirs, &c. *by such conveyances, ways and means as their (Wadham's and Stevens's) counsel should advise, all the ground, &c.* conveyed in fee to him *Watts*, his heirs, &c. by the trustees of the late *J. B.'s* estates, together with all buildings, &c. since made thereon; in consideration whereof *Wadham* covenanted that he and *Stevens* would pay *Watts* at or upon the execution of such conveyance as aforesaid 1000*l.* in moieties, and that they, *Wadham* and *Stevens*, would out of the first yearly ground-rents which should be reserved in respect of the ground upon any under grants thereafter to be made by them, amounting to the yearly sum of 200*l.* over and above the yearly sum of 142*l.* then payable out of part of the ground to the said trustees, &c. assign and convey to *Watts* so much of the said ground-rents as should amount to 200*l.* per annum. And by a memorandum, part of the same deed, it was agreed that *Wadham* and *Stephens* should, on or before the 24th of *June 1794*, lay out on the said ground 5000*l.* The declaration then averred, that although *Watts* before his bankruptcy, and the plaintiff *Heard* since, had respectively performed and been ready to perform all things in the said deed on their part, &c., yet protesting that *Wadham* the testator had not performed any thing on his part, &c. nor the defendant since, &c. avers that the ground, in the said deed mentioned to have been conveyed in fee to *Watts* by the trustees of *J. B.'s* estates, was by certain indentures of lease and release dated 24th and 25th of *March 1791*, and before *Watts* became a bankrupt, conveyed by the said trustees, &c. to *J. Cornish* and his heirs in trust for *Watts*; and that afterwards, and before *Watts* became a bankrupt, viz. on 2d of *April 1791*, by eleven several conveyances, *Cornish* conveyed, and *Watts* confirmed, unto eleven several persons and their heirs eleven respective plots of ground, parts of the said

(a) Vide *Griesley v. Higginbotham*, post, 636.

(1) [The decisions upon the Riot Act possess unfortunately an interest in the U. States which formerly they did not. To what extent, the county [or any other portion of the body politic made liable by statute for damage done to property within its limits, from the violence of mobs] may be held responsible; and what damage to the sufferers may be considered as properly consequential to the act of the rioters, and what otherwise may be illustrated and defined by reference to the decisions alluded to.—W.]

ground in the deed of agreement mentioned to have been conveyed to *Watts* by *J. B.*'s trustees, each subject to a rent of 13*l.* 13*s.* reserved thereon to *Cornish* in trust for *Watts*. That afterwards, and before *Watts* became a bankrupt, by certain other indentures of lease and release of the 25th and 26th of September 1792, *Cornish* at the special instance and by the express direction and appointment of *Wadham* deceased, granted and conveyed, and *Watts* confirmed unto *J. Lockier*, *T. Stephens*, and *J. Powell*, and their heirs as tenants in common, all the grounds, &c. mentioned in the said deed of agreement to have been conveyed in fee to *Watts* by the trustees of *J. B.*'s estate, *save and except so much and such parts thereof as were granted and conveyed away as aforesaid by the said eleven several and respective conveyances*, with all buildings and improvements thereon, &c.; and also all those said eleven several and respective yearly rents of 13*l.* 13*s.* reserved thereon; in trust as to the estate of *Powell*, to the use of the said *Lockier* and *Stevens*, and their heirs, &c. as tenants in common. And the plaintiff further says, that the ground mentioned in the said deed of agreement, to have been conveyed in fee to *Watts* by *Richard* and *Susanna Lewis* (trustees for *J. B.*'s estate) were by indentures of lease and release of the 1st and 2d of August 1791, and before *Watts* became bankrupt, conveyed by *R.* and *S. Lewis* to *Watts* and one *J. S.* their heirs, &c. to the use of the said *J. S.* his heirs, &c. during *Watts*'s life, remainder to *Watts* in fee; that on the 12th of April 1792, one *Jones* became lawfully possess of a certain part of the said ground in the said deed of agreement mentioned to have been conveyed in fee to *Watts* by *J. B.*'s trustees for a certain term of years, and also of the residue of the said last-mentioned ground for the residue of a certain other term by way of mortgage for securing the re-payment of money with interest, and on 26th of September 1792, before *Watts* became bankrupt, the said *J. S.* and *Watts* conveyed and confirmed to *Wadham* deceased, *T. Stevens*, and *J. Powell* (subject to the aforesaid mortgage terms therein) the said ground in the said deed of agreement mentioned, to have been conveyed in fee to *Watts* by *J. B.*'s trustees, &c. to the use of the said *Wadham* deceased, *Stevens*, and *Powell*, and the heirs of *Wadham* deceased and *T. Stevens*, as tenants in common, in trust as to the estate of *Powell*, to the use of *Wadham* deceased and *Stevens*, their heirs, &c. And the plaintiff avers, that the said *T. Jones* at all times from the making of the said deed of agreement hitherto hath been, and still is ready and willing to grant and convey to *Wadham* and *Stevens*, and their heirs, &c. by such conveyances, &c. as the counsel of *Wadham* and *Stevens*, &c. should advise all the aforesaid estate and interest, and term, of years of him *Jones* in the said ground, &c.; but *Wadham* and *Stevens*, in the lifetime of *Wadham* and the defendant, and *Stevens* since *W.*'s death never did, nor did either of them require *Jones* so to do, or tender any such conveyance to *Jones*, to be executed by him for the purposes aforesaid; and on the contrary, *W.* and *S.* &c. and defendant and *S.* &c. have hitherto waived and relinquished the execution of any such conveyance, &c. That after the said deed of agreement, viz. on 29th of December, 1792, the mortgage money to *Jones*, was paid off, and it was between *Jones* and *Wadham* and *Stevens*, &c. that *Jones* should be and he thereupon became and still is a trustee for *W.* and *S.* &c. of the said parts of the said ground so possessed by him for the respective residues of the terms aforesaid. And although the said several conveyances so made by the deeds of the 25th and 26th of September 1792, and the premises thereby granted and conveyed, were respectively accepted, taken, and received by *Wadham* deceased, *T. Stevens*, *J. Lockier*, and *J. Powell* respectively, in lieu of and as and for the said conveyances and premises so by the said deed of agreement agreed to be granted by *Watts*, &c. as aforesaid, nevertheless *Wadham* deceased or his assigns did not at or upon the execution of such conveyances as aforesaid, or at any other time whatsoever, pay, nor has the defendant since, &c. paid to *Watts* before he became bankrupt, or to the plaintiff as his

assignee, the moiety of said 1000*l.* &c. Nor (2dly) have *Wadham* and *Stevens* paid the other moiety, &c. Nor (3dly) though under grants were made, &c. the 200*l.* per ann. was not reserved to *Watts*, &c. Nor (4thly) the 5000*l.* laid out in buildings; nor (5thly) the reserved rent of 142*l.* per ann. been paid; nor have *W.* and *S.* indemnified *Watts* from the payment of the same, *as by the terms of the aforesaid implied covenant* they ought to have done, &c. but have suffered a large sum to become in arrear, &c., in consequence of which *Watts* was forced to pay 200*l.* in discharge of part of the arrears, and the goods of the plaintiff as his assignee have since been distrained for the residue, &c. to the plaintiff's damage, &c. Pleas. 1. *Non est factum.* 2. That *Watts* did not grant or convey, or tender or offer to grant, &c. the said grounds in the said agreement mentioned to *Stevens* and *Wadham* deceased, &c. or to any other person for their use or by their direction, *on or before the said 18th of June* in the said deed of agreement mentioned, according to the form and effect of his covenant, &c. 3. That although certain deeds, dated 25th and 26th of *September 1792*, were executed by *Watts* and *J. S.*, yet they or either of them did not thereby grant and convey the said ground mentioned in the said deed of agreement, &c. in manner and form as in the declaration is supposed. 4. That no such indenture of release as in the declaration is lastly mentioned was executed. 5. That at the time of making the indentures of lease and release in the declaration last mentioned, neither *Watts*, nor *J. S.*, nor *T. Jones*, nor any other who executed the same indentures, were seised or possessed of a legal estate in fee in the said ground, &c. or of any estate or interest whereby they, or either of them, could convey the said last-mentioned premises in manner and form as in the declaration supposed to have been granted and conveyed to *Wadham*, *Stevens* and *Powell*; but that at the time of the making, &c. one *T. Coates*, or some other unknown, was seized of and in the said ground, &c. and was a necessary party to the conveying the same, which said person did not convey, &c. 6. That *T. Jones* is mentioned to be a party to the said indenture of release in the declaration last mentioned, for the purpose of conveying and assigning the term of years there said to have been vested in him, and that *Wadham* deceased required him to execute the same, which he never did. 7. That true it is, that the said several indentures of lease and release mentioned of the 25th and 26th of *September 1792*, were made and executed by *Watts* long after the 18th of *June 1792*, to wit, on the days mentioned, &c., and that the said indentures were not accepted by *Wadham* and *Stevens* deceased, as and for the conveyances agreed to be made by the said deed of agreement. 8. As to the non-payment of the moiety of the 1000*l.* by *Wadham* deceased, that after the making the said deed of agreement *Watts* became bankrupt, and before the exhibiting the plaintiff's bill, viz. on 26th *September 1792*, he *Watts* by a certain deed of five parts, between *Watts*, *Cornish*, *Wadham* deceased, *Lockier*, *Stevens*, and *Powell*, did acknowledge to have received the said moiety of the 1000*l.*, and therefrom did release, &c. said *Wadham*, &c. 9. A similar plea as to the other moiety of the 1000*l.* of which, and every part thereof, *Watts*, by another deed did release, &c. *Wadham*, his heirs, executors, &c. 10. Payment of the moiety of 1000*l.* 11. As to the ground-rents to be conveyed and reserved to *Watts*, &c.; that no such under-grants were made by *W.* and *S.* &c. 12. Protesting that no such under-grants were made, &c. averred that no ground-rents exceeding in the whole 142*l.* had been reserved upon such under-grants. 13. *Plene administravit.* Replication. As to the 2d plea the plaintiff demurred, and assigned for cause that the said plea was immaterial and inissuable: and for that it did not state that any conveyances, &c. were advised by the counsel of *Wadham* and *Stevens*, &c. for the conveying of the said ground, &c. or that any such or other deeds or conveyances were tendered to *Watts* for execution, *on or before the said 18th of June* in the said deed of assignment mentioned, *or at any other time*: on which

there was joinder in demurrer. To the 5th plea the plaintiff replied, that *Watts*, at the time of making the indentures of lease and release in the declaration last mentioned, was seized of a legal estate in his demesne as of fee in the ground, &c. mentioned, subject only to the said term of years whereof *Jones* was possessed. To the 6th plea, that *Wadham*, deceased did not always require that *Jones*, should execute the indenture in the declaration last mentioned in manner and form as the defendant had alleged. To the 8th plea, that though it was in the said indenture there mentioned expressed that *Watts* acknowledged to have received the moiety of the 1000*l.*, and therefrom did release *Wadham*, &c., yet he (*Watts*) did not really and in fact at the time, &c. nor at any time before or since, &c. nor the plaintiff since receive the said moiety, &c. but the same was still unpaid. To the 9th plea, that though it was by the said indenture there mentioned expressed, that *Watts* did thereby release *Wadham* from the said 1000*l.* in the declaration mentioned, yet that such supposed release was inserted in the said indenture, and the said indenture was executed by *Watts* upon consideration that the said 1000*l.* should be paid previous to or at the time of executing that indenture, in manner in the said deed of agreement mentioned; but the said sum was not in fact paid to or received by *Watts* at the time, &c. nor had *Watts* or the plaintiff at any time since been paid the same or any part thereof, but the same was still wholly due. To the 13th plea, that the defendant has, and at the time of the plaintiff's exhibiting his bill had assets of the testator, out of which the defendant might have satisfied the damages. And upon all the other pleas issues were taken. Rejoinder joined in demurrer to the second plea; and demurred generally to the 8th and 9th pleas; and went to issue on the others.

Lawes, for the plaintiff, admitted that he was estopped by the matters pleaded in the 8th and 9th pleas from recovering the 1000*l.*: but as to the second plea, which went to the whole cause of action, he contended that the matter therein contained was no bar to the plaintiff's recovery upon the breach for non-payment of rent. It appears that the defendant is in possession of the plaintiff's estate under the deed of agreement. That plea tenders an immaterial issue, namely, that *Watts* did not convey or offer to convey, &c. *on or before the 18th of June*. That is not a condition precedent. The conveyance was to be in such manner as the other party's counsel should advise. It lay upon the defendant, therefore, to point out in what form the conveyance should be made; and the plea should have proceeded to state a tender of such a conveyance to *Watts* and a refusal by him, or at least a demand of some conveyance and a neglect on his part. *Washington v. Burgon*, Moor, 570. 1 Bac. Abr. 673. *Rosewell's case*, 5 Co. 19. b. But at any rate, the covenantee may waive the condition; and here it is admitted upon the record, that the conveyances afterwards made were accepted by *Wadham* and the others in lieu of the conveyances covenanted for by the deed of agreement; and the premises conveyed were taken in lieu of those contracted for. It is said in 2 Com. Dig. 342, L. 2, that non-performance of a condition shall be excused if the feoffee accept another thing in satisfaction.

Abbott, contra. The cases cited only shew that where there is a covenant to perform a certain thing at a certain time, if performance, of another thing, or at a different time, be accepted in lieu of the other, it is an answer to an action for the non-performance of the thing stipulated for: but they do not shew that an action may be maintained upon the original contract. Here the original contract was abandoned and another substituted in the place of it, upon which the plaintiff may have a remedy of another sort. *Wadham* was not bound to accept under the original contract what he is admitted to have accepted. The bankrupt covenanted on or before a certain day to convey *all* the ground, &c. in consideration of which *Wadham* covenanted to do certain other things; the plaintiff therefore cannot sue on the covenant without shewing that *Watts* performed what he undertook to do. It was not ne-

cessary for the defendant to shew that his testator desired a conveyance; but the plaintiff should have shewn that the testator did not name his counsel. *Rawlins v. Vincent*, Carth. 124. In equity, indeed, a specific performance will sometimes be decreed after the time; but that is where the other party has acquiesced, as in *Pineke v. Curtis*, 4 Bro. Ch. Rep. 329. [Lord *Kenyon* observed, that the practice of the Court of Chancery was much altered of late years in this respect: for that now that Court would not entertain a bill for a specific performance to compel a vendee to make good his purchase if no conveyance were tendered to him within the time stipulated for by his contract; unless it were shewn that he had waived that stipulation.] The Lord Chancellor admitted in that case, that at law the vendor could not bring an action against the vendee for non-performance of the contract without having tendered him a conveyance. But where the time is enlarged by consent the party must sue upon the contract so enlarged. So where the time is enlarged under an arbitration-bond, which limits the award to be made within a given time, the party complaining of the non-performance of the award must bring his action on the subsequent agreement, and not on the bond. *Brown v. Goodman*, cited in *Little v. Holland*, 3 Term Rep. 592. But further, the bankrupt conveyed a different thing from what he covenanted to do, and in respect of which the testator covenanted on his part. In lieu of part of the premises (the whole of which *Watts* was to convey) he has conveyed some ground rents: and this failure of performance on his part is the more material, as this was ground to be conveyed on a building lease, upon which 5000*l.* was to be expended. A party who covenants to convey a thing must convey it in the same state in which it was contracted for. *Duke of St. Albans v. Shore*, 1 H. Blac. 270. The acceptance of other conveyances than those covenanted for may give the plaintiff another remedy, but not an action on the original covenant to do a different thing. *Cook v. Jennings*, 7 Term Rep. 381. The case of *Luke v. Lyde*, 2 Burr. 882, and 1 Blac. Rep. 290, was there referred to as shewing the contrary; but that is not so; for the action there was *assumpsit* (as appears by referring to the record), though the form of action does not appear by the report in *Burrow*. As to the last breach assigned upon an *implied* covenant—(this was abandoned as untenable).

Lawes, in reply, rested on the principal ground, that the second plea was no answer to the declaration. The time was not material, as the conveyance was to be such as *Wadham's* counsel should advise, and it lay upon the defendant to shew that the advice was given. The case in Carthew 124, is distinguishable from the present; for that was an action on a bond, where the debt was absolute at law on the obligor, and he could only discharge himself by shewing a strict compliance with the condition, which he could not do by shewing that another thing had been substituted in lieu of it. It is no answer to say, that another action lies on the new agreement, for that not being in writing the statute of frauds would avoid it, [Lord *Kenyon*. Why may not the action lie if the agreement be executed?] At any rate, it is no answer by the defendant to an action of covenant, for non-performance of what his testator was bound to do, to shew that the bankrupt has done all that he contracted to do, but which the other had waived; although the plaintiff might have been liable for a breach on his part, if it had not been waived. In *Terrey and another v. Duntze*, 2 H. Blac. 389, the plaintiffs having covenanted to build a house for the defendant and finish it on or before a certain day, in consideration of a sum of money which the defendant covenanted to pay the plaintiffs by instalments as the building proceeded; it was holden, that the finishing the house was not a condition precedent to the paying the money, but that the covenants were independent, and therefore the plaintiffs might maintain an action of debt for the whole sum, though the building were not finished at the time appointed.

Lord *KENYON*, C. J. It is clear that those were not dependent covenants;

for the money was payable by instalments during the progress of the work ; but it is as clear that these are dependent covenants. I never expected to hear it said, that these were independent covenants ; where one man agrees to pay a certain sum of money on a given day, and another covenants to convey an estate to him on the same day ; can it be contended for an instant, that though the one has not conveyed he may call upon the other to pay the money. Common sense revolts at such a proposition. It is impossible for the plaintiff to answer the objection made to his recovery in this form. He has covenanted to do certain things which have not been done ; but the other party has indulgently accepted something else in lieu of that which he might have insisted upon. The parol agreement so substituted may be sufficient whereon to found an action of *assumpsit* ; but how can it be the foundation of an action upon a covenant under seal, whereby the parties bound themselves to perform a different contract ?

GROSE, J. The plaintiff cannot maintain an action on the covenant, without shewing a compliance with it on his part.

LAWRENCE, J. The conveyance of the estate covenanted to be conveyed is a condition precedent to the plaintiff's right of action ; and many cases in the books may be cited to shew, that where one party is to do a certain thing on a certain day, in consideration of which the other party is to do another thing, the party suing for a breach of the contract must shew that he had performed, or was ready to perform, his part on the day. And all the cases cited where a substitution of one thing for another was admitted were where subsequent to the breach of covenant the covenantee had agreed to accept another thing in satisfaction of his damages, which was an answer to an action for the non-performance of the thing stipulated. I rather think there are cases to shew, that where one covenants to convey by a certain day in such manner as the vendee's counsel shall advise, the vendor must allege that he called on the vendee to name his counsel, and that he went to the vendee's counsel and demanded him to point out what conveyance he would have ; but that either the vendee would not name his counsel, or that the latter when required would not point out, &c. But here there is a decisive answer on this ground, that the parties came to a subsequent agreement by parol to do a different thing than that which the covenant required ; and the plaintiff attempts to maintain an action on the former contract, by proving the performance of that subsequent agreement, and not of the contract declared on. Even if there were no remedy at law on the subsequent agreement, the plaintiff might still go into equity ; but I see no objection with respect to the statute of frauds, where the contract has been executed.

LE BLANC, J. At least it was incumbent on the plaintiff to shew that he was ready at the day to have conveyed what he had covenanted to do, and that he had done every thing which lay upon him to do for that purpose, but that the other party had prevented him from doing the act. If that had been shewn, it would have likened the case more to that of *Terry v. Duntz*, in which there was an averment of that kind. But the finishing of the building there could not be a condition precedent to the payment of the money, because part of it was to be paid before the particular day named for the finishing of the work. Here the plaintiff has neither shewn performance on his part at the day, nor any excuse for non-performance on account of any fault of the defendant. He neither states that he had performed his part, nor was ready to have performed it, but was prevented from doing so by some act or non-performance on the part of the vendees (1)(2).

Lawes then desired leave to amend, admitting at the same time that if the

(1) Vide *Johnson v. Reed & al.* 9 Mass. Rep. 78. *Van Benthuyssen v. Crapser*, 8 Johns. Rep. 257.

(2) [*See Green v. Roberts*, 5 Wh. 84.—W.]

conveyance of the ground-rents were not equivalent to a conveyance of the land under the circumstances, it would not help the plaintiff's case.

Lord KENYON, C. J. said, it could not be so considered.

Judgment for the Defendant.

Graham v. Sime.

1 East, 632. June 18, 1801.

A covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c. for the perfect surrendering and assuring the premises at the costs and charges of the seller, is not broken by non-payment of the fine to the lord on the admission of the purchaser; for the title is perfected by the admittance of the tenant, and the fine is not due till after the admittance.

IN covenant the plaintiff declared, that whereas by a certain indenture made on the 8th Jan. 1801, between the defendant and his wife *Elizabeth* of the one part, and the plaintiff of the other, reciting a devise of certain copyhold premises to the defendant's wife (then the wife of J. S.) for life, remainder to R. F. and his heirs; and reciting the death of J. S. and the marriage of his widow with the defendant, and that the defendant and his wife had contracted with the plaintiff for the sale of the said copyhold premises, thereby covenanted to be surrendered to him, for the life of *Elizabeth*, for 275*l.*; it was witnessed, that in pursuance of the agreement and in consideration of 275*l.* payable by instalments in the manner therein expressed, the defendant for himself and his wife covenanted with the plaintiff that they, at his or her proper costs and charges, at the then next or some subsequent court, &c. at the request of the plaintiff, would duly surrender the premises, &c. And it was further covenanted, that the defendant and his wife, and all others claiming any estate, &c. in the premises during the life of *Elizabeth*, should at all times during her life upon the reasonable request, *and at the costs and charges of the defendant and his wife, or one of them*, make, do, and execute, &c. all such further and other lawful and reasonable acts, deeds, surrender, and assurances for the more perfect surrendering and assuring, &c. the premises, to the use of the plaintiff during the life of *Elizabeth*, as by the plaintiff or his counsel should be reasonably required, &c. The plaintiff then averred, that though he had paid the money and performed the indenture on his part, yet the defendant and his wife did not, at their proper costs and charges, at the next court, &c. surrender the premises, although requested; but on the contrary, that though the defendant and his wife did afterwards, on the 11th of April 1801, duly surrender the premises, yet that certain *fees and expences* became due and payable as *costs and charges* on the surrender, amounting to 5*l.*, which the defendant and his wife refused to pay. 2dly, That the defendant and his wife did not do other reasonable acts, &c. for better surrendering and assuring, &c. as by the plaintiff were reasonably required; but that for better surrendering and assuring, &c. the premises, it became necessary that the plaintiff should be admitted to the premises at the said court, and that *a certain fine should be paid* to the lord of the said manor *on the admission* of the plaintiff, &c. amounting to 18*l.*; for making effectual the same: and then the plaintiff averred, that such admission of him took place, and the said fine was due and payable during the life of *Elizabeth*, &c.; but that neither the defendant or his wife paid the said 18*l.* to the lord, &c. on the admission of the plaintiff, although duly requested, &c. as an assurance required, &c. by the plaintiff; and therefore, &c. The plea took issue on the first breach assigned, and demurred to the second breach, because it was not alleged in the declaration that the payment of the fine therein mentioned was any act, deed, or assurance necessary or requisite to be made or performed by the defendant, or that the same

was a reasonable fine, or that the defendant and his wife had notice of such fine, or that the plaintiff had sustained any damage by the non-payment thereof.

Lambe, in support of the demurrer, was stopped by the Court.

Espinasse, contra, said, that the intent of the covenant was, that the seller should pay all the expence of the conveyances and acts necessary to make a good title to the purchaser: and that the payment of the lord's fine was part of the assurance necessary to perfect the plaintiff's title. But

The Court referring to *Hobart v. Hammond*, 4 Co. 28. a, and *Rez v. The Lord of the Manor of Hendon*, 2 Term Rep. 484, said, that no fine was due to the lord till after admittance, and consequently the plaintiff's title was complete before the fine was due.

Judgment for the Defendant.

Nowlan v. Geddes.

1 East, 684. June 19, 1801.

To a declaration against one upon joint promises by him and another, whom he avers to be outlawed, a plea of *nul tiel record* of outlawry is in effect a plea in abatement, for want of parties; and therefore, if it conclude in bar, it is bad on general demurrer, and the plaintiff is entitled to judgment *quod recuperet*, &c.

THE plaintiff declared in *assumpsit* upon joint promises against the defendant *A. Geddes* and one *George Laing*, "which said *George* was and is "now in due manner outlawed," &c. Plea by *Geddes*, after imparlance, that *actio non*, &c. because there is no such record of the judgment of outlawry against the said *G. L.* in the said declaration mentioned now remaining in the Court, &c. as the said plaintiff has above in and by his said declaration supposed; and this the said *A. G.* is ready to verify: wherefore he prays judgment if the said plaintiff ought to have maintained his aforesaid action thereof against him the said *A. G.* To this there was a general demurrer, and joinder.

Lawes, in support of the demurrer, said, that in effect the plea only amounted to this, that another ought to have been sued jointly with the defendant; and therefore the plea ought to have concluded in abatement, and not in bar. For every plea in bar ought to go to the merits; unless where collateral facts pleaded are an inducement to or substratum of the action; and then they may conclude in bar: And it was necessary for the plaintiff to demur, otherwise he would be concluded by the judgment on a plea in bar.

Barrow, contra. The plea was properly in bar. The proceedings are by original against two, and the declaration states a joint promise, and yet is against one only: for the demurrer to the plea admits the fact, that there is no record of outlawry against the other. And he referred to *Horner v. Moor*(a), where debt being brought upon a *joint* bond against one, judgment was arrested. But

All the Court agreed, that as the plea amounted only to a plea in abatement, it was ill to conclude in bar(1). And by

LAWRENCE, J. The demurrer only admits what is properly pleaded; and if the plea should have concluded in abatement and not in bar, the demurrer does not admit facts not rightly pleaded. Now the plea is in effect, that another joint contractor was not sued, which is a plea in abatement. In the case cited, it did not appear on the face of the declaration that the other joint obligor was outlawed.

(a) R. R. Mich. 24 Geo. 2, cited by Aston, J. in *Rice v. Shute*, 5 Burr. 1614.

(1) Vide 1 Chitt. Plead. 446.

LE BLANC, J. The admission of the fact by the demurrer cannot vary the case; for supposing the defendant had pleaded that there was a joint promise, (and the present plea is in effect no more,) and the plaintiff had demurred, that would have been equally an admission of the fact, and yet no doubt such a plea must have concluded in abatement.

Et per Curiam. The judgment in this case is not a *respondeas ouster*, but a general

Judgment for the Plaintiff (a).

Greasley v. Higginbottom and Another.

1 East, 686. June 19, 1801.

Where a mob, after beginning to demolish and pull down a house, steal flour therein, or force the owner to sell it at an under price, the value thereof cannot be recovered in an action against the hundred on the 6th section of the riot act, 1 Geo. 1. st. 2. c. 5, such stealing and robbery being substantive felonies and not within the offence created by the 4th section of the act. But flour which was spoiled or destroyed at the time of such beginning to demolish, &c. may be so recovered.

THIS was an action on the stat. 1 Geo. 1. st. 2. c. 5. s. 6, against the hundred of *Stapleford* in the county of *Nottingham*, for a reparation in damages by reason of the pulling down in part the dwelling-house of the plaintiff by persons unlawfully, riotously, and tumultuously assembled. On the 3d of *September*, a mob consisting of more than two hundred persons came in the morning to the plaintiff's house at *Stapleford*, who was a flour-seller and grocer; and after beating him, and threatening to break the windows and pull the house down, they actually broke the windows of the house and kitchen, cut the iron and staunchions, and broke the window-shutters. They also pulled down a lean-to or little out-house, and tore off the roof of it. This latter was so placed, that when pulled down there was left an opening outwards from the upper chamber of the house, which had communicated as a doorway into the upper part of the lean-to. Out of the lumber-room with which this was connected the mob took a quantity of flour; some of it they sold one amongst another against the plaintiff's consent at their own price (nearly half the value), which they paid to the plaintiff; some was stolen; and some was thrown about and wasted; in all more than two hundred stone. On the part of the hundred it was first objected, that the lean-to was no part of the dwelling-house; which was over-ruled. 2dly, That the facts proved did not amount to the felony described in the 4th sect. of the riot act, viz. that of the persons being unlawfully, riotously, and tumultuously assembled to the disturbance of the public peace, and unlawfully, and with force beginning to demolish and pull down the plaintiff's dwelling-house. At the trial *Graham, B.* agreed, that in order to make the hundred liable, the acts done by the persons so assembled must amount to the offence described in the 4th section; but he thought the case proved brought them within it. It was also objected, that at any rate the plaintiff was not entitled to recover for any part of the flour which was taken and sold by the mob, but only for the damage done to the house and lean-to, and the flour spoiled in so doing. The jury, however, under the Judge's direction, found a verdict for the plaintiff for the several amount of the damages sustained by him in each respect, making altogether 40*l.*

Clarke and Reader, in *Easter* term last, obtained a rule for the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on the last-mentioned ground of objection; the flour which was stolen, including that which was taken and sold against the will of the owner, being a felony

of another description, and not within the meaning of the 4th sect. of the riot act, creating a new offence, and consequently not within the 6th clause, giving a remedy against the hundred for damages occasioned thereby.

Balguy now shewed cause, and said, that though the 4th clause was highly penal, and therefore to be construed strictly, yet the 6th clause on which the action was founded was a remedial law, and ought consequently to receive a liberal construction. And here the damage arose from one continued act, and all flowed from the original violence.

The Court, however, were of opinion that the hundred were only liable for the damage done to the house and lean-to, and for such of the flour as was spoiled or destroyed in doing that damage: but that as to the flour stolen, or, which in effect was the same thing, taken away and sold without the consent of the plaintiff, that being a distinct felony in the offenders, an offence which existed before the passing of the riot act, and not an injury done to the party by beginning to demolish or pull down the house, it was not within the 4th clause of the act, and consequently not within the clause giving damages against the hundred(a).

On this, the plaintiff's counsel consenting to remit the damages given for the flour stolen or taken away by the mob and sold, the rule for the new trial was discharged without costs.

The King v. Stone.

1 East, 689. June 20, 1801.

If a conviction before a justice of peace on the game-laws state that the defendant was present at the time when the information was read and the witnesses examined and that when called on for his defence he produced no evidence, and did not require any further time; that is sufficient, without stating that he was previously summoned to answer, &c. *Qu.* Whether it be necessary for the prosecutor to negative by evidence as well as in the information the qualifications of the defendant to kill game? and *Qu.* Whether the negative of such qualifications must be repeated in the adjudicatory part of the conviction, or whether it be not sufficient to convict the defendant of the offence *aforesaid*, referring to the previous part of the conviction which sets forth the information in which such qualifications were specifically negated.

THE following conviction on the game laws was removed into this Court by *certiorari*.

Bedfordshire, to wit. Be it remembered that on the 6th of *January*, in the 41 Geo. 3; at, &c. *T. French*, of, &c. cometh before me *J. Webster* clerk, one of the justices, &c. and then and there giveth me the said justice to understand and be informed, that *T. Stone* of *A.* in the county of *B.* gentleman, within three months then last past, that is, on *Saturday* the 3d of *January*, in the 41st year, &c. at *M.* &c. he the said *T. S.* being a person not then having lands or tenements or any other estate of inheritance in his own right or his wife's right of the clear yearly value of 100*l.* per ann. &c. (and so negating all the other qualifications of the stat. 22 & 23 Car. 2.); nor then being in any other manner qualified or entitled in his own right to keep or use any engine to kill and destroy the game of this kingdom, did keep and use a certain engine to kill and destroy game called a gun, against the form of the statute, &c.: of which said information, and of the offence therein charged upon him as *aforesaid*, he the said *T. S.* on the said 6th of *January*, &c. at *M.* &c. had notice. Whereupon the said *T. S.* appeareth, and is then and there on the 6th of *January*, &c. at *M.* &c. present before me the said justice to answer and make his defence to the said information and the offence therein charged upon him as *aforesaid*; and he the said *T. S.* having heard the same is asked by me the said

(a) Vide *Ratcliffe v. Eden*, Cowp. 185. *Hyde v. Cogan*, Dougl. 699, and *Reid v. Clarke*, 7 Term Rep. 496, and *Burrows v. Wright*, ante, 615.

justice if he can say any thing for himself, why he the said T. S. should not be convicted of the premises above charged upon him in form aforesaid? and the said *Thomas Stone* pleadeth that he is not guilty of the said offence. Nevertheless, on the said 6th of *January, &c.* at *M. &c.* two credible witnesses, to wit, *J. C.* of, &c. and *J. W.* of, &c. come before me the said justice in their own proper persons, and before me the said justice, in the presence of the said T. S. they the said *J. C.* and *J. W.* being respectively then and there on the same day and year aforesaid, at *M. &c.* duly sworn, &c. and depose, &c. (the conviction then set forth the evidence of the witnesses as to the fact of the defendant's having killed a pheasant on *Saturday* the 3d of *January* 1801, in the parish of *M. &c.* but not stating any evidence of the disqualification of the defendant). And thereupon the said T. S. being asked by me the said justice if he had anything to say, or can produce any evidence in answer to the several matters deposed to by the said *J. C.* and *J. W.* as aforesaid, he the said T. S. pretends and represents to me the said justice, that he the said T. S. on the said 3d of *January, &c.* was qualified both in his own right and in right of his wife to kill game, but doth not produce any evidence thereof; nor that he the said T. S. on the said 3d of *January, &c.* had any lands or tenements or any other estate of inheritance in his own right or his wife's right of the clear yearly value of 100*l.* per ann., or for term of life, or any lease or leases for 99 years, or for any longer term, of the clear yearly value of 150*l.*; nor that he the said T. S. was the son and heir apparent of an esquire, or of other person of higher degree; nor that he was the owner or keeper of any forest, park, chase, or warren, or game-heeper to any lord or lady of or for any manor or manors; nor in any other manner qualified in his own right to keep or use any engine to kill and destroy the game of this kingdom; nor doth he produce any sufficient evidence thereof in answer to the several matters deposed by the said *J. C.* and *J. W.* as aforesaid; nor doth the said T. S. require any further time for that purpose. And thereupon it manifestly appears to me the said justice, that the said T. S. is guilty of the offence above charged upon him in and by the said information. Wherefore, I the said justice, on the said 6th of *January, &c.* at *M. &c.* on the oaths of two credible witnesses so taken before me as aforesaid, do adjudge him the said T. S. to be guilty of the offence aforesaid; and do thereupon convict him of the same; and do declare and adjudge that he the said T. S. hath forfeited the sum of five pounds for the same offence, to be distributed as the statute in that case made and provided doth direct.

M Intosh on the part of the defendant, objected, 1st, that the conviction does not state that he was duly *summoned*; and that this was not cured by alleging that the defendant was present; for if a man be not apprised beforehand when he shall be called upon to answer a charge, he cannot be prepared for his defence or have his witnesses ready. In *Rex v. Heber*(a), an information was granted against a magistrate for convicting one without summoning him, he happening to be present when another person was convicted for the same offence, who had been previously summoned. It was there said to be a most known rule of common justice that no man should be convicted of an offence till he had previous notice given him of the charge. To be sure, in *Rex v. Johnson*, 1 Stra. 261, it was holden, that appearance cured all defects in the summons; but there the objection went only to the shortness of the summons, it having been issued on the same day on which the defendant was required to appear. In *R. v. Venables*, 1b. 630, and 2 Ld. Ray. 1405, it was ruled that a summons was necessary; but there no appearance was stated. (The Court expressing their opinion, that the appearance of the party, especially as he did not ask

(a) 2 Barnard. 34, 77, 101, (when this book was cited Lord *Kenyon* observed, that *Barnardiston* was a bad reporter; and that probably, if the conviction itself were looked into, it would appear either that the party was not called upon for his defence, or had not proper time given to him upon request.) Vid. 2 Stra. 914, S. C.

for further time, dispensed with the summons, this objection was abandoned.) 2dly, Neither the evidence nor the adjudication negatives the qualifications required by the stat. 22 & 23 Car. 2.; the want of which is of the very essence of the offence. This was holden to be necessary in *R. v. Jarvis*, 1 Burr. 148. It is true, that the qualifications are here negated in the information; but that alone is not sufficient; for as the information is the ground of the summons, so the evidence is the ground of the adjudication, and the latter cannot go further than the evidence warrants. And though it was said in *R. v. Crouther*, 1 Term Rep. 125-7, that it had been no where directly decided that the evidence should negative every particular qualification; yet that was not the point in judgment; and at least that imports that there must be some general evidence of disqualification to put the party accused on his defence. But here there is not even general evidence. In *R. v. Wheatman*, Doug. 345, where the qualifications were negated by the evidence, but not in the information, *Ashhurst*, J. said, that the evidence must prove, but could not supply any defect in the information. And in the precedent in *Burn(a)*, the evidence negatives every particular qualification. And that form was agreed to be sustained in *R. v. Thompson*, 2 Term Rep. 78, and *R. v. Hartley*, E. 22 Geo. 3, Cald. 175, there cited; though the Court in other respects did not approve of it.

Lord KENYON, C. J. referred to a MS. note of *The King v. Jarvis(b)*,

(a) 2 Burn's Justice, tit. Game.

(b) *REX v. MORICE JARVIS*, Hil. term 30 Geo. 2.—This was a conviction against the defendant upon the game laws. The conviction sets forth, that on 12th October 1754, at *Hillerton* in the county of *Wilts*, *A. B.* came before the justices convicting and made information, that the defendant within 2 months, at the parish of *H.* in the said county, had and used a setting dog and setting net, *he not being then qualified by the laws of this realm to keep and use, &c. to kill game*. The conviction further sets forth, that *Webbe*, a credible witness, came to the place aforesaid, and made oath, that, &c. (in the words of the information.) It then states, that the defendant having been summoned and appearing before the justices at *Devizes* in the said county, and the evidence being read to him; and he being asked what he had to say for himself, and saying nothing except denying the fact; and therefore the justices adjudge that the defendant was *not anywise qualified, empowered, licensed, or authorized* to kill and destroy game, or to keep and use dogs and nets to kill and destroy the game, and adjudge him guilty of the offence, and to forfeit the sum of 5*l.* This conviction being brought up by *certiorari* and put in the paper, and coming on now to be argued,

Mr. Gould against the conviction, objected 1st, The justices have not shewn that they have a jurisdiction; because they have not stated precisely that *Jarvis* had no qualification. The witness swears generally, that the defendant was not qualified to kill game: that is not sufficient; but every qualification mentioned in the stat. 22 & 23 Car. 2, ought to be set forth; and the defendant should be adjudged to have none of them: indeed other subsequent qualifications (as being lord of a manor, &c. which is an implied qualification by a latter statute) need not be set forth. *Rex v. Hill*, 1 Lord Ray. 1415. In *Bluet q. t. v. Needs*, Comyns, 525, a general averment of the defendant's disqualification was considered as not sufficient in a conviction, though well enough in an action. *Rex v. Pickells*, Mich. 19 G. 2. The conviction there was for keeping and using a lurcher. It was objected that there was no averment that defendant was not lord of a manor. *Lee*, C. J. said, "He found no instance of that species of qualification being set forth; that all the qualifications mentioned in the statute of Car. 2, must be set forth; but this is not in the precedents, because it is only an implied or argumentative qualification; the others are expressed." 1 Stra. 497. The first objection: there is the strong one, upon which I believe that conviction was quashed. This is not a point of form only, but is of substance, and is necessary to give the justices jurisdiction; and therefore must be set forth. 2d, The witness was examined, in the first place, in the absence of the defendant, which was an irregular proceeding. The defendant should first have been summoned, and have had an opportunity to appear; because such examination is *ex parte*; and when a witness has once sworn a thing he is in a manner bound to abide by it though false, so that the defendant cannot cross examine him upon fair terms. And here too, it is to be observed, that at the second meeting, when the defendant was convicted, the witness was not sworn again, but his former deposition read; so that there was no opportunity for cross examination on any terms. 3d, It is said that the defendant was not then qualified, three times are mentioned before in the conviction; 1st, the time of the offence committed; 2d, the time of the information given; 3d, that of the conviction. To which does *then* refer? *Mr. Norton*, contra. If the Court see that there is an information made, an offence prov-

which was taken by the late Lord *Ashburton* when at the bar, and corroborated the report by Sir *James Burrow*; in which, he observed, that

ed, and that the defendant has been heard, or had an opportunity of being heard, they will not be astute in finding flaws. To the 2d objection it has been said the justice should have summoned the defendant before he examined the witness. But I apprehend it would have been a stronger objection had he summoned the party to appear without any probable cause. If the defendant had desired an opportunity of cross examining the witness he had a right to it; but it does not appear he desired it, though the witness then attended. The only defence that the defendant made was that he did not commit the fact; he does not claim the qualification. To the first and great objection, the justices have adjudged the defendant expressly to be in nowise qualified, empowered, licensed, or authorised; than which words nothing can be well stronger. In *Rez v. Chandler*, 1 Ld. Raym. 581. *Holt*, C. J. said, "It is sufficient for the justices to pursue the words of the statute." It was incumbent on *Jarvis*, if he had a qualification, to prove it; the justices were only to expect a charge of the fact committed from the witness examined. For it is almost impossible for a witness to prove that the defendant has not some of the qualifications. As for instance, he must be a herald and well skilled in the laws of precedence to know who at this time is an esquire, or a person of higher degree. To know who is qualified by virtue of this estate a witness must be intimately acquainted with a person's rental. A search must be made with the clerk of the peace before a witness could know who was a game keeper. And, lastly, how can a witness inform himself whether the party he accuses be keeper of a chase, &c.? All these are negatives; the defendant is summoned to prove the affirmative if he can. There are several cases, though not expressly in point, yet applicable by parity of reasoning. In *Rez v. Ford*, 1 Stra. 555, which was a conviction for keeping an alehouse without licence, it was objected that there was an exception in the act, and, that it should appear he did not fall within it; but the Court held that that exception coming by way of proviso, the defendant should have insisted on it in his own defence. *Rez v. Theed*, 1 Stra. 605, is in point; for there the exception did not come in by way of proviso, but in the enacting part. But further, it is sufficient if a conviction follow the very words of the statute. The statute of Queen Anne, on which this conviction is grounded, has the words "not being qualified according to the laws in being" (or to that purpose); now here are these and stronger words added. In *Q. v. Matthews*, 10 Mod. 27. Vin. Abr. and Barn's Justice, the Court said, it had been enough if the want of qualifications had been alleged generally; but it was holden bad, because some, but not all, were set forth. In *Rez v. Marriott*, 1 Stra. 66, the conviction was holden bad, because the words were the words of the witness; but had they been the words of adjudication of the justices it seems it would have been well. As to the case of *Rez v. Hill*, it is certainly an authority against me as far as it goes; but it is stated so shortly that one can form little judgment from it. The words in that case possibly were the words of the witness, or there might be some other objection not stated. The case in Comyns, 525, as far it goes, is with me; for in an action of debt for the penalty on this act, it is clearly enough to allege the want of qualifications generally. How those two cases are distinguishable I protest I do not see: the reason is the same; the defence is the same in both cases. In *Rez v. Pickells* the conviction was affirmed, though the objection taken was stronger than here. One qualification was omitted, though the others were set forth particularly; and I do not see why that qualification being created by another later law should alter the case. Therefore, the point determined in that resolution seems not against us. He was then proceeding to answer the other objection; but the Court told him it would be determined on this; and also told Mr. *Gould* he need not take the trouble of replying.

Lord *Mansfield*, C. J. If this matter was *res integra*, and open to be gone into by reasoning at large, yet I should think it necessary for the justices to show that the person convicted was an object of their jurisdiction; that is, that he had none of the qualifications mentioned in the statute of Car. 2. For it is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them (1). But in this case I do not think myself at liberty to go into the question, if it were doubtful; for all the cases from the making of the statute are uniform in support of the objection. The judgment in the *Queen v. Matthews* has nothing to do with this case; that is an *obiter* saying only at best. In *Rez v. Marriott*, the witness swore generally, that the person was not qualified; that was holden bad. The witness in this case swears exactly the same; and the justices adjudge on that evidence only. The stream can never go higher than the spring head. *Rez v. Hill* is in point. In the case from Comyns, as that was an action, the general averment might be sufficient; because in the examination of the question at the trial the qualification might be gone into. The Chief Justice, in *Rez v. Pickells*, argued from this as a settled point, *exceptio probat regulam*. Therefore this point seems settled by all the determinations; for which reason I do not enter at large into the question; though if I should do that, the exception seems well founded.

the Court had given an express opinion on the very point in favour of the objection now urged. His lordship read the note here subjoined.

Gibbs, contra. The information in *Rex v. Jarvis* omitted to negative the defendant's qualifications, and was therefore clearly bad; and what was there said by the Court must be taken with reference to the point in judgment. There can be no difference in the rules of evidence as applicable to proceedings before justices of peace, and before the superior courts; and in actions for penalties it never was deemed necessary for the plaintiff to disprove the defendant's qualifications. It is impossible in the nature of the thing that a prosecutor should be able to prove all those negatives. If the fact constituting the offence be proved, it is sufficient to put the party upon his defence; and he to whom the fact must be best known must prove the affirmative, and shew that he was qualified to do it. It is true, that in *R. v. Thompson*(a) the precedent in *Burn* was sustained; but the Court expressed great dissatisfaction with it, and this point was not in question. It must indeed be stated in a declaration for the penalty, that the defendant "not being a person duly qualified, &c., to kill game," &c. did the act; but it is not necessary for the plaintiff to prove the disqualification; and if not, neither can it be necessary for the prosecutor to prove the like allegation in an information before a magistrate. If the negative of the qualifications were not introduced in the same clause of the act by which the offence is constituted, it would not be necessary even to state those negatives in the information; but that is a mere technical rule of pleading; and it cannot alter the nature of the evidence, whether such matter be introduced in the same or any subsequent clause; it is still only matter of defence, and the affirmative must be proved by the party who wishes to avail himself of it. As to the other objection, the magistrate does adjudge the defendant not to be qualified; for the information charges that he was not qualified in the manner required; and that being read to him, he denies it, and pleads not guilty to the whole; then the fact being proved, and he pretending to be qualified, but giving no evidence of it, as it was incumbent on him to do, the justice adjudges him guilty of the offence *aforsaid*; which therefore refers to the offence as charged in the information.

Lord KENYON, C. J. The first objection is fairly gotten rid of. Justice requires that a party should be duly summoned and fully heard before he is condemned; but if he be stated to be present at the time of the proceeding,

Dennison, J. I thought this question had been at rest; because it is founded on strong reasons and rules of law. There is a known distinction between exceptions in a statute by way of proviso (which need not be set forth) and those in the purview of the act: and to this point there is a very strong case, (*Rex v. Bell* vide Post. 430.) upon an indictment against a person for having coining instruments in his custody. It was said by Mr. *Norton*, that in a conviction it is sufficient to pursue the words of the act of parliament; but I think that is not so; and there are many cases where it has been ruled otherwise. Among other instances it was so determined in the case of *Rex v. Chapman*, Easter term 28 Geo. 2, upon a conviction of a person for *robbing an orchard*; which the Court held not sufficient; but it ought to have appeared of what, and how, the orchard was robbed, that they might judge whether it were a robbery within the meaning of the 43 Eliz. c. 7.

Poster, J. I am of the same opinion. Where negatives are descriptive of the offence, there they must be set forth. The case my brother *Dennison* refers to upon the stat. 8 & 9 W. 3, for having coining instruments in his custody is very strong. I am strongly inclined against the authority of the case in *Comyns* upon the action of debt for the penalty.

Conviction quashed.

(a) On the mention of this case Lord Kenyon, C. J. said, One point in that case has always afforded me great dissatisfaction; namely, that the Court would in any case intend that the evidence was given in the defendant's presence, without its so appearing on the face of the conviction. Mr. Justice Buller, unadvisedly as I think, in that case held that the form of conviction there pursued was well enough, because the precedent in *Burn* was in the same form. I am very sorry that that was ever acquiesced in by me(1). I have often thought, since that there is sound sense in what was once said by the late Lord C. J. *Eyre*, that the sooner a bad precedent was gotten rid of the better.

(1) Vide *R. v. Lovett*, 7 Term Rep. 153, and *R. v. Swallow*, 8 Term Rep. 284.
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and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any, this at all times has been deemed sufficient. On the other point there is much weight in the objection. The case of *The King v. Jarvis* was decided above forty years ago : and at that time Mr. Justice *Dennison* thought that the question had been long at rest ; and Lord *Mansfield* said, that it had been settled by such a train of authorities that he did not think himself at liberty to go into the question : and he referred to the case of *The King v. Marriott*, where the witness only swearing generally to the want of qualification of the defendant was holden not to be sufficient. No comparison can be made between summary proceedings on a conviction before magistrates, and actions in the courts of common law. In the former, it is incumbent upon the magistrates to shew expressly that they had a jurisdiction in the particular instance ; and they have no jurisdiction to convict unless the defendant had none of the qualifications mentioned in the statute of 22 & 23 Car. 2. All these being in the purview of the act must be specifically negatived by the prosecutor in his information. The distinction between this case and one where the exceptions are introduced by way of proviso in a statute, was expressly stated by Mr. Justice *Dennison*, than whom no person was ever better versed in the rules of special pleading. And in Sir *James Burrow's* report of the case, 1 Burr. 154, it is stated to have been said by him, " that the evidence of the adjudication ought both of them " to be, that the defendant has not those qualifications that are specified in the " act, or any of them." That that was so stated and understood by the bar at the time appears from the precedent of the form of such a conviction settled by Mr. *Dunning*, which is given by Mr. *Boscawen* in his treatise on convictions^(a), in which precedent the qualifications are all specifically negatived not only in the information, but also in setting forth the evidence, and again in the adjudication. But it is said to be impossible for the prosecutor's witness to give negative evidence of the want of qualification in the defendant : but I do not see why that may not be done. A witness may give general evidence of it from his belief. He may know the defendant, and know that to all appearance he is not a man of substance : evidence may be given of his condition in life to raise a reasonable presumption against his having any of the necessary qualifications. It is necessary for courts of justice to hold a strict hand over summary proceedings before magistrates, and I never will agree to relax any of the rules by which they have been bound. Their jurisdiction is of a limited nature, and they must shew that the party was brought within it. Shall it be sufficient for the witness to say, that he saw such a person (perhaps a nobleman of the highest rank and largest fortune in the kingdom) out a shooting on such a day ; and shall that be sufficient to convict him, because the information, which is not upon oath, contains in point of form an allegation that the defendant was not qualified. If this were sufficient to warrant a conviction, unless the defendant proved his own qualification, it may be necessary for him to bring his title deeds and witnesses from the furthest part of the kingdom, in order to shew his qualification. The proposition is monstrous ; and the inconvenience and vexation would be insufferable. I know not how far it may not extend. The legislature only intended to subject persons not having certain qualifications to this summary jurisdiction. The defendant must therefore be shewn to be such a person. And if Lord *Mansfield*, Mr. Justice *Dennison*, and Mr. Justice *Foster* thought that all this was necessary above forty years ago, surely the length of time which has since elapsed, without their decision having been called in question, has not weakened but rather confirmed the authority of it. Therefore, I am of opinion in this case, that evidence ought to have been given of the defendant's want of the qualifications mentioned in the statute, which the magistrate should have set out in

(a) p. 156. vide p. 44-1. in the same book.

the conviction, and that he should have proceeded to adjudge that the defendant had not those qualifications.

GROSE, J. I shall not attempt to vindicate all the doctrine which is to be found in the books respecting summary proceedings before justices of peace. There are certain technical rules laid down for their observance, which I cannot reconcile to the rules which regulate proceedings in other cases. I cannot say why there should be any distinction between the mode of proof in a proceeding of this sort, and in an action on the game laws, where I believe no negative proof is ever given by the prosecutor of the want of qualification in the defendant; but the affirmative proof lies upon him to shew such qualification. On looking, however, into the books, one finds that distinctions have been made between them, and that certain technical rules have been established for regulating proceedings on convictions which cannot now be overthrown without manifest confusion. Amongst other rules it has been said by Lord Mansfield and Mr. Justice Dennison, that there must be evidence of the defendant's want of qualification in order to warrant a conviction: and there is no such evidence stated in this conviction. Whatever therefore my opinion might have been if this had been *res nova*, I cannot set up my judgment against theirs, which has been so long acquiesced in, and therefore I feel myself compelled to say that this conviction is bad.

LAWRENCE, J. Every conviction must undoubtedly charge, that the defendant had none of those qualifications which are mentioned in the enacting clause of the statute; for unless that be so charged, there is no offence imputed to the defendant of which he can be convicted. Then the fact committed by the defendant which brings him within the offence charged must be proved and set forth, and the magistrate must proceed to convict him of the offence imputed to him. But if there be a complete charge of the offence in the information, I do not see that, if the adjudication convict the party of the offence as charged against him in the information, it is necessary to repeat that charge in the adjudicating part of the conviction: the repetition of it does not make it stronger or more clear. Then as to the mode of proof by which the charge is to be sustained, I see no reason why the proof of the fact committed by the defendant should not *prima facie* be sufficient, at least so as to throw the *onus* upon him of proving that he was qualified to do it. The difficulty of proving the negative of all the qualifications stated is so great as to make it impossible in some cases for a prosecutor to do it. It may perhaps sometimes be shewn that the defendant is in some inferior situation of life, such as a servant or the like, and so it may be presumed that he is not likely to be qualified: but the qualifications themselves are very numerous; and where the party is not known, or his circumstances not apparent, it must be almost impossible for a prosecutor to give even that sort of evidence, much less to disprove every qualification mentioned. A party may have small estates in several counties unknown to the prosecutor, all which together may amount to a qualification, though each were much below it. At any rate, there seems to be little or no advantage to a defendant in calling upon a witness to give general negative evidence of want of qualification, even in cases where it is capable of being done from a previous knowledge of the party. And if the main fact be proved that he killed the game, &c. and he does not then prove that he was qualified to do so, nor desires further time to bring forward such proof, it appears to me that the justice is authorised to conclude that he is not qualified, and to convict him of the offence charged in the information. Here the information charges an offence within the jurisdiction of the convicting magistrate; the witness proves the fact committed by the defendant, which subjects him to the penalty of the statute; and the adjudication referring to the offence charged in the information convicts him of such offence. But in *Rex v. Jarvis* the defect was in the information itself, which did not negative the qualifications. To that therefore must be principally referred what was

said by the Court ; which appears to have been grounded on the case of *The King v. Marriott*, where the witness swore to the want of qualification, without its being charged in the information. Indeed, in *Rez v. Crowther* it seems as if it was required of the witness to give general negative evidence of the defendant's want of qualification, though it was holden not to be necessary to negative every particular qualification. But in that case it was not necessary to determine upon the necessity of it. And I cannot see what advantage it is to the defendant if it were given. Therefore, upon the general rule which governs evidence of this sort, I think the affirmative proof lay on the defendant, and that the conviction is right.

LE BLANC, J. The conviction states the information laid before the magistrate, which negatives every particular qualification in the defendant. Then it states, that the party had notice of the charge, and was present when the witness was examined ; that he pleaded not guilty, and the witness proved the fact against him ; and then being called upon to make his defence, he pretended that he was qualified, but produced no evidence of it ; whereupon the justice adjudges him guilty of the offence aforesaid. The first objection made is, that there was no summons, but that has been properly given up ; for when it is stated that the party was present and heard the charge and the evidence against him, and made no defence, nor required any further time to prepare his evidence, it seems to be fully sufficient to warrant a conviction. Secondly, it is objected, that the evidence does not negative the defendant's qualifications ; and thirdly, that they are not negated by the adjudication. As to this last, when the information charges that he had none of the particular qualifications required by the statute, which it specifically sets out, and the justice adjudges him guilty of the offence aforesaid ; that must necessarily mean the offence as it appears to be charged in the information, and is the same as if the adjudication had repeated in the negative all the qualifications there stated. As to the second objection, that the evidence does not negative those qualifications. In general the rule is considered to be, that a party is not required to prove a negative, but it lies on the other side to prove the affirmative of that which he insists on. Where the party has notice by the information of the offence with which he is charged, and which states that he had not such and such qualifications, that gives him notice to come prepared with proof that he has any such qualification. So far he is benefitted by the form of the information. But as to the proof, I do not know that there are different rules of evidence in case of proceedings before magistrates from those which apply to actions in the courts above. And if the Court were to determine that it was necessary for the witness to negative the defendant's qualifications, in order to warrant a conviction by a magistrate in this mode of proceeding, I do not see why it must not be equally necessary to give the same evidence before a judge and jury in an action for the penalty. Whatever is an authority for the one must I think equally bind the other. In *Rez v. Jarvis* the information itself did not negative the qualifications ; that therefore was a fundamental objection. It was there neither charged, proved, nor adjudged that he had not any of the particular qualifications mentioned in the statute. The observation, therefore, made on that case by the Court, applied to the information and to the whole of the proceedings, because in no part of the conviction were the particular qualifications negated : It was not necessary, therefore, to discriminate between the information and the evidence. Therefore, as the information in this case contains a proper and full charge of the offence, and it appears to me to be impossible that the prosecutor should be able to prove negatively that the defendant has not any of the qualifications mentioned, I think the conviction right.

The Court, being equally divided, made no order.

The King v. The Inhabitants of Sutton.

1 East, 656. June 20, 1801.

A service under a hiring by the week (the servant boarding and lodging himself,) nothing being said about *Sunday*, but the servant working on that day occasionally when asked by his master, without additional wages, though he sometimes received victuals, may be joined with service under a yearly hiring as a menial servant; so as to confer a settlement by hiring and service for a year.

TWO justices by an order removed *Thomas Dunsford*, together with his wife and three children, by name, from the parish of *Mitcham* to the parish of *Sutton*, both in the county of *Surry*. On appeal a case was reserved, stating, That the pauper having gained a settlement in *Cheam*, hired himself by the week to Mr. *Hatch* of *Sutton*. Nothing was said about *Sunday* in the contract; but the pauper worked on that day occasionally when asked by his master without receiving any additional wages; though he sometimes received some victuals. He received his wages on *Saturday* night or *Sunday* morning; and resided in his master's house during no part of the time, but boarded himself. That at the expiration of nine months, on his master's family servant going away, the pauper was hired in his place for a year, at 12*l.* *per annum*, and served eleven months under that hiring. The Sessions, being of opinion that the pauper gained a settlement in *Sutton* under such hiring and service, confirmed the order.

Nowlan and *Cowley*, in support of the order of Sessions contended that this case came within the principle of *Rex v. Bagworth*, Cald. 179, where it was determined that service under a hiring for a year would connect itself with preceding services under any number of hirings from week to week. The only question then is, Whether the pauper continued under the control of the master the whole time, *Sundays* included? If so, no doubt a settlement was gained, according to what was expressed by *Foster, J.* in *R. v. Wrington*(a); and at least it was evidence sufficient to warrant the finding of the Sessions, as was said by Lord *Kenyon* in *R. St. Mary Lambeth*, 8 Term Rep. 239. A hiring by the week must *prima facie* be taken to include *Sunday*, if nothing be said to the contrary; and this presumption is much aided by the fact found, that the pauper did occasionally work on the *Sundays* for his master whenever he was asked, for which he received no additional wages; though sometimes he had victuals, which was evidently only by way of gratuity. Where the contract was general, though the servant claimed and exercised the privilege of having *Sundays* and even holidays to himself, it was holden to be no exception in the contract, and he gained a settlement under it. *Rex v. St. Agnes*, Burr. S. C. 671. The case of *R. v. Birmingham*, Dougl. 333, and Cald. 77, went on the same ground. No difference is here stated in the nature of the services under the respective hirings, only that the pauper during the time that he served by the week did not lodge in the master's house: but that is not material. In the last-mentioned case, the pauper sometimes lodged with his master, and sometimes not: and when he did, he paid for his board. Such also was the case in *R. v. Whitechapel*, 9 Mod. 169. *Foley*, 146. 2 Const. 457, and *St. Peter's in Oxford v. Chipping Wycomb*, 1 Stra. 528. In *R. v. Seaton and Beer*, E 24 Geo. 3. 2 Const. 352, service under a hiring at weekly wages the same as the other man, (who had filled the same employ,) and the avails of the stables, was joined to a service under a yearly hiring, so as to confer a settlement. So an alteration in the wages or the service in the middle of the year will not prevent the gaining a settlement under a yearly hiring.

(a) Burr. S. C. 292, (and vide *R. v. Macclesfield*, ib. 460.)

R. v. Alton, E. 24 Geo. 3. Ib. 382. and *R. v. Grendon Underwood*, Cald. 369. In *R. v. Great Chilton*, 5 Term Rep. 672, it was not denied that the services, though differing in the same degree as in the present case, might be joined; but a majority of the Court held, that the first contract being dissolved, and the pauper being married when he made the second contract, therefore the services could not be joined. The only case which seems to bear the other way is *R. v. Wrington*, Burr. S. C. 280: but there the pauper, though stated generally to be hired by the week, always received her wages on the *Saturday*, and her master then told her to come to work again on the week following. She was afterwards hired for a year: but the Court would not connect the services, because the pauper under the former hiring was not under the control of her master at nights or on *Sundays*. But here the contrary is found by the facts stated, and the conclusion drawn by the Sessions. Something also turned there on the nature of the service, which was a manufactory: but this was a general service, in husbandry. Besides, when that case was decided, the distinction between exceptions in the contract and dispensations of service were not so well settled as at present; and at any rate, that determination was prior to the case of *R. v. Bagworth*, where the conclusion was different.

Marryat and Lawes, contra. The services to be joined must be *ejusdem generis*, and the servant must continue the *whole* year under the control of the master. Now here, 1st, the services were of a different nature; the one as a weekly labourer boarding and lodging out of the master's family; the other as a menial servant under a yearly hiring. But, 2dly, From the very nature of the first contract the *Sundays* must have been excluded. The contract of a weekly labourer out of doors is always understood to be for the working days only of the week. The very circumstance of his master's asking him occasionally to work on the *Sundays* shews that by the general contract he was not bound to do so; and accordingly he generally received some gratuity for it. The case of *R. v. Wrington*, Burr. S. C. 280, is in point; and that is not contradicted by *R. v. Bagworth*; for there the pauper was a menial servant in the house all the time, which was mainly relied on by the Court in giving their judgment: but here it is otherwise.

LORD KENYON, C. J. It has now been too long settled to be recalled, that if there be a hiring for a year and a service for a year, though but a small part of the service were performed under the yearly hiring, a settlement will be gained. But an attempt has been made to introduce a new head of settlement law, of which I have no knowledge, under a notion that only services *ejusdem generis*, as it has been said, can be joined. That term got into fashion some time ago. At that period, Mr. Justice Foster thought that settlements were too easily acquired by the construction which the Court was inclined to put on the statute: but since then the leaning has been in favour of them; and it has been supposed that a person ought to gain a settlement in that parish where he has laboured for a certain time, as a reward for his labour: a strange idea, if examined; because somewhere or other he must at any rate be maintained if he be in want of it. I know not how to state this as a question upon which any doubt can be made. The pauper was hired by the week: nothing was said about *Sunday*; it is very seldom that there is: Why then is that day to be excluded? If a servant be hired for a year, nobody doubts but that *Sundays* are included. Then why not included in a weekly hiring, if no exception be made? The Sessions have found that there was a hiring by the week, which must mean the whole week. There is nothing stated to shew it was otherwise intended. The pauper was paid sometimes on the *Saturday*, sometimes on the *Sunday*; and whenever the master ordered him to do any work on the *Sunday* he did it: What is to be concluded from thence, but that it was his duty to do so? How do these facts shew that he was not under the master's control on the *Sundays* as well

as other days of the week? In *B. v. Wrington*, it appeared from the circumstances that *Sundays* were excluded. But it is said, that the services cannot be joined, because they were not *ejusdem generis*. I really know not what that means, nor where the line is to be drawn. Suppose a postillion were made coachman; would those be deemed services *ejusdem generis*? It is said, that he was first an outdoor servant, and then a *family* servant: but I do not know what difference that made in his services. Upon the whole, I cannot do better than adopt what the justices below have done: they have determined that there was a continuing service for a year and a hiring for a year, and that he gained a settlement; and I think they are warranted by the authorities in that conclusion.

GROSE, J. First, it is objected, that the servant was not under the control of the master his whole year. Secondly, that the services were not *ejusdem generis*, and therefore cannot be joined. As to the first, it is said that *Sundays* were not included in the weekly hiring. But why not? The hiring was by the week, and nothing was said about *Sunday*; and he did whatever his master bid him do on that day. What are we to collect from thence, but that the parties considered that *Sunday* was included; and the justices have by their order found that it was. Then secondly as to the services not being *ejusdem generis*; under both contracts the pauper was a servant in husbandry, only boarding in the one case out of the master's house, and in the other boarding in it. Then what is this but the same sort of service throughout.

LAWRENCE, J. assented.

LE BLANC, J. I cannot see upon the facts stated, that the service under the one hiring was of a different nature from that under the other.

Order confirmed.

Miller v. Newbald.

1 East, 662. June 22, 1801.

A writ of error allowed is a *supersedeas* in law to all further proceedings in the court below: and therefore proceedings were set aside with costs for irregularity where the *ca. sn.* being returnable on a day after the allowance of the writ of error, was returned after notice of such allowance on the same day; and *sci fa.* afterwards taken out against a bail.

THIS was a rule calling on the plaintiff to shew cause why the proceedings against the bail in this cause since the service of the allowance of the writ of error should not be set aside for irregularity with costs. The plaintiff obtained final judgment in *Easter* term last. A writ of error was sued out on the 2d, and allowed on the 3d of *June*. The *capias ad satisfaciendum* was returnable on the 5th of *June*, and about 4 o'clock in the afternoon of the same day, the allowance of the writ of error was served; after which the *ca. sa.* was returned, and a *scire facias* sued out against the bail. This was moved by

Yates, on the ground that the allowance of the writ of error operated as a *supersedeas*, and therefore the execution executed afterwards was irregular.

Wigley shewed cause, admitting the general rule, but alleging that there was reason to be satisfied in this case that the writ of error was merely for delay, in which case the Court would not set aside the proceedings. And he cited *Kempland v. Macauley* and another, 4 Term. Rep. 436, where the Court refused to set aside an execution for the costs of a nonsuit sued out after notice of the allowance of a writ of error; because it could only be for delay in that case. That shews that the allowance of the writ of error is not an absolute *supersedeas* to the proceedings in this Court. But by

Lord KENYON, C. J. A writ of error allowed is in point of law a *supersedeas*. There is a case to that purpose in Lord C. J. *Willes's Reports*, *Merri-*

ton v. Stevens, Willes, 271, determined upon great deliberation. We have indeed refused in some cases to help the party by whom it had been taken out merely for delay, if it expressly so appeared, considering him in the nature of a delinquent. But nothing of that sort appears here.

Per Curiam,

Rule absolute.

Price and Another v. Bell.

1 East, 668. June 22, 1801.

An assured upon an *American* ship and cargo, provided with such a passport as is required by the treaty between *America* and *France*, and with all other usual *American* papers and documents, is entitled to recover against an underwriter of a policy on [such ship and goods in case of a capture by a *French* privateer, notwithstanding a sentence of condemnation of the same as lawful prize by a *French* court of admiralty; such sentence proceeding on the ground of a breach of *French* ordinances requiring certain particulars to be observed] in respect of the ship documents beyond what was necessary by the treaty. *Qu.* Whether if a ship be not warranted of any particular country, there be an implied warranty in a policy of assurance that he shall be properly documented according to the laws of that country, and her particular treaties with foreign states.

THIS was an action upon a policy of insurance on ship and goods from *London* to *Charlestown*; with liberty for the ship in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever; and the plaintiffs declared as upon a loss by capture in the course of the voyage on the 28th of *December* 1797. At the trial before Lord *Kenyon*, C. J. at *Guildhall*, a special verdict was found, which stated in substance as follows:

The plaintiffs, on the 22d of *November* 1797, caused the policy in question to be effected, which was underwritten by the defendant. The ship was an *American* ship belonging to the plaintiffs, but no warranty respecting that circumstance was made to the defendant, or to any other of the insurers on the same policy. On the 30th of *January* 1797, the ship, being about to proceed from *Charlestown* on a voyage to the *Havannah*, obtained at *Charlestown* three passports or sea-letters in the *English*, *French* and *Dutch* languages, the same as are constantly made use of by all *American* ships, and respectively signed by the President of the *United States* in the following form(a): "*George Washington*, President, &c. To all, &c. Be it known, that permission has been granted to *A. R.* commander of the ship *South Carolina* of *Charlestown*, of the burthen of 250 tons being at present in the port of *Charlestown*, and bound for *Havannah*, loaded with salt, &c. that after this ship has been visited and before his departure, he shall make oath before the officers authorised for this purpose, that the said ship belongs to one or more citizens of the *U. S.* of *A.*; the act whereof shall be placed at the foot of these presents; and in like manner that he will keep and cause to be kept by his crew the maritime ordinances and regulations; and enter a list signed and confirmed by witnesses, containing the names and surnames, the places of birth and residence, of the persons composing the crew of his ship, and of all those who shall embark therein, &c.; and in every port or harbour which he shall enter with his ship, he shall shew the present permission to the officers authorised thereto, and make a faithful report of what has passed during his voyage; and he shall carry the colours, arms, and ensigns of the *U. S.* during his said voyage. In testimony whereof," &c. Sealed with the seal of the *U. S.*, and countersigned by the collector of the customs of *Charlestown*, and dated 30th of *January* 1797.

The ship afterwards sailed from *Charlestown* to the *Havannah* with the aforesaid passports, and returned therewith to *Charlestown* in the beginning of

(a) Only the *French* translation is here given, as that on which the argument principally turned at the bar.

May in the year 1797, when the captain deposited the passports together with the other ship's papers at the custom-house there; and on the 27th of the same *May*, being about to sail again in the said ship upon a voyage from *Charlestown* to the *Havannah*, and from thence to *London*, he received back from the deputy collector of the customs the said passports, with an indorsement made by the said deputy collector thereon, as follows: District and port of *Charlestown*, *May* 27th, 1797. These are to certify to all whom they may concern, that *Andrew Robertson*, master of the ship *South Carolina*, has this day cleared for the *Havannah*, laden with sundry articles of merchandize, consisting of oil, dry goods, and tallow. Given under my hand and seal of office at *Charlestown* the day and year above written. (Signed) *W. W. Dep. Collector.*" The captain at the same time took and made entry of all such other documents and papers as are usually taken or made entry of by captains of *American* ships. On the 1st of *June* 1797, the ship sailed upon the said voyage from *Charlestown* to the *Havannah* and *London*, and arrived in the river *Thames* in *September* 1797; and after her arrival there took on board the goods insured. And the captain having been obliged by the death of several of the crew to take others on board, all of whom were *American* subjects, procured a new muster-roll upon oath made before the Lord Mayor of *London*, and signed and certified by the *American* minister, having left the original muster-roll with the said minister. Afterwards, on the 11th *December* 1797, the ship sailed on the voyage insured from *London* to *Charlestown*; and on the 23th of the same month, was captured by a *French* privateer and carried into *L'Orient*. The ship at the time of her sailing upon the voyage insured, and from thence until and at the time of her said capture, had on board, together with all other usual papers and documents, the abovementioned passports so indorsed as aforesaid, and also the said muster-roll so signed as aforesaid; which were exhibited to the captain of the said privateer. Proceedings were instituted against the ship before the tribunal of commerce at *L'Orient*, by which the following sentence of condemnation^(a) was pronounced, dated the 14th *Pulvisse*, 6th year of the *French* republic: The ship *South Carolina*, commanded by *A. R.*, was she attacked, &c. as a prize under *English* colours? Was captain *R.* at his departure from *Charlestown* provided with a list of the crew in the form required by the *French* laws and regulations? At the time of the capture was the list of the crew taken away which the captain declared that he had taken at *London*, to replace his first list? Had that list, supposing it to exist, the legal form to supply the first list? Do the bills of lading and other papers touching the cargo prove the neutral property of it? Considering in fact, that there is no proof that the privateer *Le Patriot* stopped the *South Carolina* under *English* colours; that Captain *R.* does not prove that he was provided with a list of the crew attested by the public officers of *Charlestown*; that it appears that the captain did really get a fresh list of the crew from the ambassador of the *United States* at *London*, and that he has not proved that this document was delivered to the captors, and that there is no proof of the pretended concealment of it: considering in law, that the register and sea-letter prove the *American* property of the ship; but that the log-book proves that the said passport dated the 30th *January*, 1797, has served for several voyages contrary to the formal regulations of the 4th article of the ordinance of the 23th *July* 1778, thus expressed; "A passport can serve but for one voyage only," &c. That admitting the existence of the list of the crew obtained in *London*, it would be insufficient to answer the intentions of the said ordinance, which sets forth, article 9th, "all foreign vessels shall be good prize, on board whereof there is a merchant, super-cargo, &c. of a country, enemy of his majesty, or whereof the crew shall

(a) The sentence was set out at length in the special verdict, but the substance only is here stated.

be composed of more than one-third of sailors, subjects of states enemies of his majesty, or which shall not have on board the list of the crew attested by the public officers of the neutral places from whence the vessels took their departure." Considering that neither the bills of lading establish the neutrality of the goods, and that the declarations of the shippers made before the mayor of *London*, made for that purpose, and by him certified on the back of them, cannot answer the regulations of *the 2d article of the ordinance*, which expresses, &c. (setting forth another *French ordinance*.) Considering that the decree of the Executive Directory of the 12th *Ventose*, 5th year, promulgates to the *Americans the ordinances of 1774 and 1778*, relating to the navigation of neutral vessels, &c. Therefore, the ship *South Carolina* and her cargo was declared good prize. From this sentence Captain *R.* appealed, and the court of appeal on the 4th *Floreale*, 6th year, &c. pronounced the following sentence (a). Questions. Is the capture of the ship &c. valid? Is the sentence of the tribunal of *L'Orient*, &c. agreeable to law and the ordinances of France? Is the demand of Captain *R.* to be allowed to prove the list of the crew, declared to have been made at *London*, and withheld from him, admissible? Reasons. Seeing that the former sentence is supported by the maritime laws and ordinances established in matters of prize; that the *4th article of the ordinance of the 26th of July 1778* expresses, "that a passport can serve but for one voyage;" and that it is evident by the log-book, that the ship *South Carolina* has made several voyages with the passport which was granted her on the 30th *January 1797*: that the 18 bills of lading do not exhibit any mark of neutrality of the goods, and that the certificate affixed thereto does not satisfy the *second article of the same ordinance*, which expresses, &c. (as before): that these bills of lading do not declare the neutrality of the goods: that the tribunal of *L'Orient* has pronounced on the supposition of the existence of the pretended list of the crew taken at *London* by Captain *R.*, which does not prevent applying to him the *articles of 9th, 12th, and 9th of the ordinances of 1704, 1744, and 1778*, and which renders useless his demand of proof respecting this list. Considering if all these provisions are not sufficient of themselves to establish the former sentence, *the law of the 22d Nivose last* declaring, that the neutrality of ships shall be determined by their cargo, the ship *S. C.* is *within the scope of this law*, as her cargo is entirely of goods of *English manufacture*, &c. Considering the fourth article of the ordinance of the 26th of *July 1778*, expressing, "A passport can serve but for one voyage only." The *9th, 12th, and 9th articles of the ordinances of 1704, 1744, and 1778*, which enacts, &c. (as before). Considering *the law of the 29th Nivose last*, expressing, article 1st, "the state of ships in regard to what concerns their neutral or enemy's quality shall be determined by their cargo; therefore, every vessel met at sea laden entirely or in part with goods the produce of *England*, shall be declared lawful prize, whoever may be the owner. The tribunal declares the former sentence valid, &c. The special verdict then set out the several *French ordinances* above referred to. It then stated, that a treaty was concluded on the 6th of *February 1778* between *France* and the *United States*, containing (*inter al.*) the following articles and form of passport. *Article 12.* The merchants' ships of either of the parties which shall be making into a port belonging to the enemy of the other ally, and concerning whose voyage and cargo there shall be just grounds of suspicion, shall be obliged to exhibit as well on the high seas, &c. not only their passports, but likewise certificates, expressly shewing that their goods are not prohibited as contraband. *Article 26.* To the end that all dissensions may be avoided, it is agreed, that in case either of the parties should be at war, the ships belonging to the subjects of the other ally must be furnished with sea letters or passports, expressing the

(a) The substance only is preserved.

name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties; which passport shall be made out according to the form annexed to this treaty. They shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year. It is likewise agreed, that every such ship being laden is to be provided not only with passports as above mentioned, but also with certificates, containing the particulars of the cargo, the place whence she sailed, and whither bound, that it may be known whether any contraband goods be on board; which certificate shall be made out by the officers of the place whence the ship set sail in the accustomed form; and if any one shall think it fit to express in the said certificate the person to whom the cargo belongs, he may do so. *Article 27th.* If the ships of the said subjects of either of the parties shall be met with on the high seas, &c. by any ship of war or privateer of the other, the said ship of war, &c. for avoiding any disorder, shall remain out of cannon shot, and may send their boats on board the merchant ship, and board her to the number of two or three men only, to whom the master of such ship shall exhibit his passport concerning the property of the ship made out according to the form inserted in this present treaty; after which the ship shall be at liberty to pursue her voyage without molestation or search, &c. It then stated the form of the passport; which was the same as that used, only leaving blanks for the names of the captain and ship, and to the places to which she belonged, and where she then lay, and the amount of her tonnage, and where bound, and with what laden, and for the date. It then set forth the decree of the 12th *Ventose*, 6th year, &c. referred to in the above sentences; which decree refers to the treaty, article 4th; "Agreeable to the law of the 14th of *February* 1793, the directions and regulations of the 21st *October* 1744, and 26th *July* 1778, concerning the manner of proving the property of neutral ships and goods, shall be executed according to their form and tenor; consequently, every *American* ship shall be good prize which shall not have on board a muster-roll of the crew in due form, such as is prescribed by the model annexed to the treaty of the 6th *February* 1778, the execution whereof is ordered by the 25th and 27th articles of the said treaty." The special verdict then set forth a law of the *United States*, dated 1st of *June* 1796, whereby the form of the passport was prescribed and a penalty of 200 dollars imposed on every captain of an *American* vessel bound to any foreign country without such passport. It then stated notice to the defendant of the premises, and a demand and refusal to pay the loss.

This case was first argued in *Easter* term 40 Geo. 3., by *Giles* for the plaintiff, and *Carr* for the defendant; and again in *Trinity* term following, by *Adam* for the plaintiff, and *Perceval* (now Solicitor General) for the defendant; and a third in *Michaelmas* term last, by *Gibbs* for the plaintiff, and *Erskine* for the defendant. Much of the argument turned upon the construction of the sentences of condemnation, the *French* ordinances, and the treaty between *America* and *France*, which is either altogether omitted or very briefly adverted to. The matter first came on in the shape of a case reserved from the Sittings; but after the second argument it was turned into a special verdict by the desire of the Court, who thought the question raised upon the implied warranty of great magnitude.

On the part of the plaintiff it was contended, 1st, that the sentences of condemnation proceeded altogether upon the breach of *French* ordinances, which carried the regulations concerning ship documents further than the treaty between *France* and *America*, by which alone the question must be governed. As to the muster-roll required by the *French* ordinances, it was decided in *Pollard v. Bell*, 8 Term Rep. 434, and *Bird v. Appleton*, Ib. 562, not to be binding upon a foreign independent nation, nor necessary in order to legal-

ize the insurance. As to the passport, the *French* ordinance of the 12th *Ventose* does indeed require that it shall be renewed every voyage; but the treaty (art. 25.) only stipulates for a renewal once a year, or as soon after as the ship returns to port. The object of the passport was not to licence the ship for a particular voyage, but to serve as an annual recognition of her country. Now here the passport was within time, being dated in *January 1797*, and the voyage to *London*, which was the second in that year, having commenced in *June 1797* from *Charlestown*, and the voyage insured from *London* having commenced in *December* in the same month, on the 28th of which *December* the ship was captured. 2dly, It was not necessary for the passport to describe the whole of the intended voyage, but only the first place of the ship's destination to which she cleared out; for the ship might afterwards vary her voyage. The treaty indeed does not require even this latter description, though a blank is left for it in the form of the passport, which was merely for the purpose of identifying the ship the better at the time. The law of the *United States*, which inflicts a penalty on the captains of such vessels as sail without first obtaining a proper passport, is at any rate only a revenue law, a breach of which would not avoid the insurance, although it might subject the party to the penalty. Besides, all this happened before the voyage insured; and admitting that she had not a proper passport as required by the *American* law, yet if it were sufficient within the scope of the treaty between *America* and *France*, as underwriter on the subsequent homeward-bound voyage could not take advantage of it. In *Christie v. Secretan*, 8 Term Rep. 192—7, one of the judges said, that he could not subscribe to the extent of the doctrine contended for at the bar, that a ship insured here must be navigated according to the laws of the country from which and to which she sails; unless it appeared that the contract of insurance tended, if enforced, to contravene any of the laws of our own country. [Lawrence, J. That must be taken with this distinction, that there is no express warranty. A warranty makes a condition precedent. But where there is none, it does not follow that because a foreign assured may for his own protection procure ship-papers required by the laws of his own country, therefore the underwriters here can avail themselves of his not having them, where the loss is not attributable to that cause.] Here it is found, that the ship had the usual documents of an *American* ship; and it lies on the underwriter to shew in what respect she was not properly documented, and that the loss happened in consequence of it. But 3dly, however doubtful the case might have been whether, if the ship had been expressly warranted *American*, it might not have been necessary for her to have had all proper *American* documents, yet there being no such warranty here makes all the difference. The very circumstance of requiring a warranty in some cases and not in others shews the understanding of the parties that the underwriter takes upon himself a greater risk in the one case than the other; and common experience shews that the value of such a risk is capable of being calculated; for the premium is greater in the one case than the other. The effect then of requiring that every ship insured, though not warranted, shall be properly documented, as the laws of that country to which she belongs require, will be to raise a warranty against the manifest intention of the parties, and after the underwriter has received a greater premium on account of the increased risk, because the assured would not make such a warranty. If the law raise such an implied warranty, it is extraordinary that the question should never have occurred before the case of *Christie v. Secretan*; upon which point however the judgment there did not proceed. And in *Rich v. Parker*, 7 Term Rep. 705, the question could not arise; for that was a case of express warranty. The implied warranty of sea-worthiness does not apply here; for the want of that is generally a latent defect, often unknown even to the owner, which renders it almost impossible for the voyage to be performed; and therefore the underwriter cannot calculate what he ought

to take for an indemnity : but there is nothing latent in the country to which a ship belongs, and therefore the risk may be calculated like that of capture. And if it be material or required to be known, the underwriter may stipulate for the usual warranty, or an enhanced premium. Sea-worthiness is an excepted case ; that is in the nature of a condition precedent, as every warranty whether express or implied must be : and such exceptions ought not to be extended further than the necessity of the thing requires ; because they avoid the contract *ab initio*, though the loss did not happen on that account. The reason why sea-worthiness is an implied warranty is because the true cause of the loss can rarely be known in such cases, and there is a violent presumption that it happened from the latent defect ; but being a condition precedent, though the loss be proved to have happened from some other uncontrollable cause, still the assured cannot recover. But it does not follow that every matter, which if the loss happened in consequence of it would be a defence to the underwriter, is therefore an implied warranty and condition precedent ; for where a ship has been guilty of smuggling on a former voyage, in consequence of which she is afterwards seized in the voyage insured and confiscated, though the insured could not recover against the underwriter for such a loss, that is not on the ground of implied warranty, but because the loss did not happen from any peril insured against : and undoubtedly if the loss happened from capture of an enemy, it would be no defence to an underwriter that the ship was liable to seizure and confiscation in consequence of a preceding smuggling voyage. Suppose the master and crew were guilty of gross negligence or impropriety, as by getting drunk, or all going to sleep at the same time, in consequence of which the ship was lost ; this not amounting to barratry, the underwriter would not be liable : but still there is no implied warranty by the owner that the master and crew shall not do such acts ; and therefore though the act were done, yet if no detriment happened from it, but the ship were afterwards lost from some peril within the policy, the underwriter would be liable. There being no warranty here of the ship's country, even if she had turned out to be a belligerent, and consequently liable to the additional risk of capture by an enemy, the defendant would still have been liable ; and yet that is a greater risk than can reasonably be expected from a neutral's want of formal documents.

For the defendant it was insisted, 1st, That the condemnation was not merely grounded on the *French* ordinances, but on the treaty between *France* and *America*, which adopts the maritime ordinances of *France* ; and the sentence, which was by a court of competent jurisdiction, has put a construction on the treaty requiring the muster-roll to be on board the ship, and that she should have a proper passport renewed every voyage, which was not the case here. Then however erroneous that construction may be, this Court cannot sit as a Court of error to revise their judgment. *Garrels v. Kensington*, 8 Term Rep. 230, went on that ground. The 26th article of the treaty requires, that before an *American* master shall take out a passport, he shall swear to keep the maritime ordinances and regulations ; which must mean those of *France* ; for *America* having then recently established her independence, had no maritime code of her own. Besides, *America* would not bind herself by treaty to keep her own ordinances, which without any treaty her subjects were bound to do. At any rate, if the treaty be doubtful, the ordinances may be taken to explain it. 2dly, If the treaty be taken to refer to the maritime ordinances of *America* only, still the passport is void, not being conformable to the *American* law ; inasmuch as the destination of the ship was not truly stated ; which is most material to be known, as was said by Sir *W. Scott* in the case of the *Juffrow Anna*, 1 Rob. Adm. Rep. 126, because questions of prize or no prize frequently depend on that circumstance. When the ship sailed the second time from *Charlestown* her true destination was to the *Havannah* and *London*, the latter being the ultimate object of the voyage ; but the passport only men-

tions the former. This was calculated to mislead the cruisers of *France*, and was a fraud upon her : and if the want of any passport would have been a good cause for condemnation, *a fortiori* a false one is so. Then this is not aided by the finding of the special verdict, that the vessel had the *usual* papers on board ; for that does not conclude the question whether such papers were *legal* by the terms of the treaty and the ordinances of *America*. Then 3dly, though the vessel insured were not warranted *American* in express terms, yet there is an implied warranty in every contract of insurance, that the ship shall be navigated according to the laws of her own country, the law of nations, and such particular treaties as bind her own country, to foreign states. It seemed to be so considered by the Court in *Christie v. Secretan*, 8 Term Rep. 192. And the opinion there intimated was the stronger, because that was an action by an insurer on goods only, who has no control over the ship ; whereas this is by the owner of the ship as well as of the cargo. This is grounded upon the same general principle which governs the case of sea-worthiness, that the assurer shall properly perform or provide for the performance of every act over which he has a control, so as not to enhance the risk of the underwriter by any laches of his own, or those whom he employs. The present is even a stronger case for the raising of such an implied warranty ; for the want of sea-worthiness is sometimes unknown to the assurer, but he can always ascertain whether the ship be properly documented. Whatever is of the essence of a contract implies a warranty, whether so called or not ; and this is not confined to sea-worthiness, but comprehends also a master and crew of adequate skill and strength adapted to the ship and the nature of the voyage ; and necessary tackle and provisions are also included. In these cases the event signifies nothing : for in case of a loss at sea, how can it be told whether it happened by the common perils of the sea, or from the insufficiency of the ship or crew, or because they were starved for want of provisions. The case of all the crew going to sleep or getting drunk is beyond any implied warranty ; because all that can be expected from the assurer is to warrant their capacity to navigate properly, and not their will or their acts. It is said, that if there be no warranty of country, the risk of the underwriter is not varied by the want of proper documents of the ship ; because he insures against all risks, even of an enemy, which are greater than those of a neutral ; but that is not so : for if the ship insured turn out to be a belligerent, the underwriter has the chance in his favour of her having provided force to repel force : she has also the protection of her own country ships of war, in the first instance, and for recapture : at any rate, she will take more pains to avoid the enemy's cruisers. Whereas an honest neutral has nothing of this sort to fear ; she sails in the face of danger without any of the precautions of an enemy ; therefore her risk is so much the greater than that of a belligerent if she do not put herself in a condition to avail herself of her neutrality when stopped and questioned. The necessary documents to prove that are just as important to her safety as sea-worthiness, and sufficient tackle, crew, and provisions. A warranty does not particularize the having such and such documents, but the necessity of having them is a consequence of law attaching on the warranty ; and therefore whether express or implied can make no difference. There is however a difference in one particular, where an express warranty goes further than an implied one ; for the former specifies the particular nation to which she belongs, and it would not be sufficient to shew that she was of any other neutral nation, though more favoured by the enemy. 4thly, If the ship were not properly documented, the assured cannot recover, although the loss happened not on that account, but from the non-observance of *French* ordinances which the *American* was not bound to observe : because it was a neglect of the assured whereby the underwriter's hazard was increased. This principle was clearly established in *Rich v. Parker*, 7 Term Rep. 705. It is true, that was the case of a ship

warranted *American*; but that makes no difference, if this be an implied warranty. And that case was the stronger, because the vessel had the passport, the required document, on board at the time of the capture, though she sailed without it in the first instance. But in *Law v. Hollingworth*, 7 Term Rep. 160, the Court held, that there was an implied warranty on the part of the assured that the ship should be navigated up the *Thames* by a competent pilot, and there having been no pilot, the underwriter was discharged; though it did not appear that the loss happened from any want of competent skill in those who supplied his place. So *Farmer v. Legg*, lb. 186, went on the same ground.

For the plaintiff, in reply to these last mentioned cases, it was observed, that they went on the ground of disobedience of regulations enjoined by our own laws.

There appeared from the suggestions thrown out in the course of the argument to be a difference of opinion on the bench respecting the question of implied warranty; and the Court took time to consider of their judgment till this term, when

Lord KENYON, C. J. delivered their opinion in the following manner. This was an action on a policy of insurance on the ship *South Carolina*, and on goods on board the same, from *London* to *Charlestown*. There was a loss by capture. The defendant pleaded the general issue, and paid the money into court on the money counts. The special verdict states, that the ship was in fact an *American* ship, but there was not any warranty in the policy. That on the 30th of *January* 1797, being then about to sail from *Charlestown* for the *Havannah*, the captain obtained the regular passports, which are set out *verbatim* in the verdict. In the beginning of *May* 1797, she returned from the *Havannah* to *Charlestown*, and deposited her passports with her other seapapers in the custom-house at *Charlestown*. On the 27th of *May* 1797, being then about to sail again from *Charlestown* to the *Havannah*, and from thence to *London*, the captain received back from the custom-house at *Charlestown* his passports, with a certificate indorsed thereon, stating that he had that day cleared for the *Havannah* with goods specified in that indorsement; and at the same time took all other documents and papers usually taken or made entry of by *American* ships. The ship sailed from *Charlestown* to the *Havannah*, and from thence to *London*, and arrived in the river *Thames* in *September* 1797. At *London* she took in her cargo (the goods insured) for *Charlestown*; and on the 11th of *December* 1797, sailed on the voyage insured, viz. from *London* to *Charlestown*, and was captured by the *French* on the 28th of *December* 1797. At the time of her capture she had on board, together with all other usual papers and documents, the passports so indorsed. She was condemned with her cargo by the tribunal of commerce at *L'Orient*; and that sentence affirmed on appeal by the tribunal of the department of *Morbihan*. Both sentences are set forth in the special verdict.

The demand made by the plaintiffs, the assured, upon this policy is resisted by the underwriter on these grounds; that although the policy does not contain any warranty of what nation or description the vessel is, yet she being in fact an *American*, the law implies a warranty on the part of the assured, that she shall be furnished with all such papers as an *American* ship ought to have: that this ship the *South Carolina* had not such a passport and certificate as she ought to have had: and that it appears by the sentence of condemnation that she was condemned for want of such papers; which by the treaty between *France* and *America* she ought to have been furnished with. On this statement three questions arise; 1st, Whether in this case there be any implied warranty that the ship shall be furnished with all papers and documents, which an *American* ought to have? 2d, Whether in fact this ship had all such papers? 3d, Whether the condemnation proceeded on the ground that she had not such papers, as by treaty or the law of her own country she

ought to have : or whether it proceeded on a want of such papers as the ordinances of *France* only require ? The opinion which we have formed on the two last of these questions renders it unnecessary at present to enter into any discussion of the first question, namely, whether there be any implied warranty in this case : on that question we desire to be understood as not giving any opinion. The sentences of condemnation appear to us manifestly to have proceeded on the ground of a breach of *French* ordinances ; particularly, the ordinance of the 26th of *July* 1778, which declares that a passport shall serve but for one voyage ; whereas by the treaty between *America* and *France* passports are to be recalled only every year ; and that only in case the ship returns into her port within the year. And in this case the passport which the *South Carolina* had on board at the time of her capture had been granted within the year ; for it is stated to have been granted on 30th of *January* 1797, and the ship was captured in *December* 1797. We therefore think that the condemnation was purely for a breach of *French* ordinances, which were contrary to the treaty, were not adopted by it, nor the condemnation expressed by the sentence to have been for acting contrary to the treaty. So that if there were any such implied warranty as has been contended for, the sentence of condemnation does not negative it. We also think that it appears upon this verdict, that this ship had all the papers necessary for an *American* vessel ; and this puts an end to the defence made by the underwriter. The two papers in which the defendant contends she was deficient are the passport, and certificate. These papers are different in their nature : the first is an authoritative declaration by the government of the country to which she belongs, that the ship is the property of subjects of that country ; and such passport this ship had at the time of her capture in *December* 1797 ; the same having been granted in *January* 1797 within the year. The other paper, the certificate, relates to the cargo, and answers to our manifest. The words of the 25th article of the treaty are, that besides the passport, " the ship shall also be provided with certificates containing particulars of the cargo ; " this from its nature must be taken out at every port where she takes in cargo. Here the ship took in her cargo for the voyage insured at *London* ; and the verdict states that she had all the usual papers and documents ; and it does not any where appear that any paper, certificate, or manifest of her cargo taken in at *London*, which was the cargo insured, was wanting. On these grounds we are of opinion that judgment must be for the plaintiffs(1).

The King v. The Justices of Wiltshire.

1 East, 683. June 23, 1801.

Where the father and son were removed from *A.* to *B.* by two several orders of removal, and the parish officers of *A.* and *B.* agreed that the settlement of the son should follow that of the father, without the expence of a separate appeal ; in consequence of which an appeal was only entered against the order removing the father ; and after the Sessions had determined that the father was settled in *A.* and had quashed that order *A.* refused to take back the son ; this Court granted a *mandamus* to the Sessions to receive and determine the appeal against the order removing the son, though at a subsequent Sessions to that holden next after the order of removal made ; the appeal being directed to be entered *nunc pro tunc* with proper continuances.

THIS came on upon a rule to shew cause why a *mandamus* should not issue to the defendants, commanding them at the next general quarter sessions

(1) But if the sentence of condemnation had decided, that the property insured was enemy's property, though the court had taken the non-compliance with *French* ordinances not binding upon other states as the basis of that decision, the sentence would, in the *English* courts, be held conclusive. Vide *Bolton v. Gladstone*, 5 East 155. S. C. in the Exchequer Chamber, 2 Taun. 85, and the authorities cited in the editor's note, 5 East 162.

to receive, proceed upon, hear, and determine the appeal of the churchwardens and overseers of the poor of the parish of *North Bradley* in the county of *Wilts*, against an order of two justices for the removal of *Jacob Smith*, his wife, and their two children from the parish of *Westbury* to *North Bradley*. The rule was obtained on affidavits stating, that by two several orders of removal dated the 31st of *December* 1800, *John Smith* a pauper and *Mary* his wife, by one of the orders, and *Jacob* their son, his wife, and two children by the other order, were removed from *Westbury* to *North Bradley*. That two several notices of appeal against both orders were given by *North Bradley* to *Westbury* parish, for the then next quarter sessions to be holden on the 13th of *January* 1801; and that *J. Francis*, one of the overseers of *North Bradley*, instructed his attorney to consent on the part of *N. B.*, that as both parishes were well assured that the settlement of *Jacob Smith* the son and his family was derived from the father, the appeal to the son's order should not be tried, and that the determination of the sessions as to the settlement of *John Smith* the father should govern the settlement of the son *Jacob*, in order to save expence. That accordingly admissions in writing were entered into by both parishes to that effect; and that the attorney for *Westbury* desired that the appeal against the order for the removal of the son might not be entered, to save expence. That *N. B.* parish, relying on the faith of such admission, only caused an appeal against the order for removing the father *John Smith* to be entered; and such appeal was accordingly tried, and the order of removal quashed; whereby the father remained settled at *Westbury*. That soon after those sessions were ended the parish officers of *Westbury*, in breach of their agreement, sent the said *Jacob Smith* and his family to *N. B.*, who were under the necessity of receiving them back; but gave a fresh notice of appeal to *Westbury*, and also served the parish officers with a notice to appear at the next sessions to shew cause why the admission before entered into by their attorney should not be confirmed. That *N. B.* accordingly appeared at the next sessions on 14th of *April* at *Sarum*, and moved to enter and try the appeal; when the court of quarter sessions refused to interfere, alleging that it was not their practice to receive any appeal if not entered at the sessions immediately following the order of removal, and that they could not notice any private agreement between the parties. The serving the two notices of appeal was also proved by the attorney for *N. B.*; who also deposed that afterwards the attorney for *Westbury* applied to him to endeavour to discover the settlement of the paupers without the expence of appealing, but they not agreeing as to the settlement of the father, but it clearly appearing that the settlement of the son was derived from the father, they agreed to admit that to save expence. The affidavit then set out certain letters which had passed between the parties, which contained a clear agreement to make the admission above specified, in order to save the expence of the second appeal, though there were other matters in controversy respecting the father's settlement.

On the other hand, the affidavits against the rule admitted the notices of appeal against both orders, and the subsequent agreement to let the son's settlement depend on that of the father, in order to save the expence of both appeals: but stated that at the conference between the two attorney *N. B.* acknowledged that *Smith* the father was once settled with them by service under indenture of apprenticeship; and the only question was, Whether he had afterwards gained a subsequent settlement by purchase in *W.*? But that upon the trial of the appeal *N. B.* refused to admit the indenture of apprenticeship, and consequently the merits of the appeal were not entered into. On which account *W.* parish refused to admit the son's settlement.

Gibbs, on shewing cause against the rule, insisted on the particular terms of the agreement to be collected from the correspondence between the parties, from whence it appeared that *North Bradley* parish did not dispute that the father was once settled there: on which account *Westbury* parish had not

some prepared with formal proof of the indentures of apprenticeship under which the settlement had been gained; and that requiring such proof at the Sessions was a departure from the agreement between the two parishes; the real subject of their dispute being only as to the subsequent settlement in *Westbury*, and which alone *Westbury* came prepared to disprove. That *North Bradley* having taken this undue advantage at the Sessions, *Westbury* parish ought not to be bound by the event of an appeal which was not decided on the real merits of the question. And he concluded by offering to let the appellants in to try the merits of the order for removing the son, if they would consent to let the father's settlement be governed by it.

Jekyll, in support of the rule, denied that the agreement extended in any respect to the father's settlement, but only to the son's which was derived from it. That there was therefore no undue advantage taken by the officers of *North Bradley* in insisting upon the proof of the original settlement in their parish. But as they were prevented from entering their appeal in time to try the merits of the order removing the son from *Westbury*, by the agreement entered into with the latter, which made it unnecessary, *W.* parish ought not to be suffered to take advantage of their own wrong; but the Court under the circumstances would now direct the Sessions to enter the appeal *nunc pro tunc*, to prevent a failure of justice. And he referred to the following note of a case furnished by one of the officers of the Crown Office.

"[*Easter term*, 23 Geo. 3. Mr. *Wilson* moved for a rule to shew cause why a writ of *mandamus* should not issue, directed to the justices of the peace for the county of *Leicester*, commanding them to proceed upon the appeal of the inhabitants of *Stoke Golding* against an order of two justices for removing *Samuel Vincent* a pauper, his wife, and four children from *Castle Donington* to *Stoke Golding*. This was grounded upon an affidavit stating, that in *January* last this order of removal was made, and notice of appeal given; that the inhabitants of *Castle Donington* discovering that the woman was not the pauper's wife, and so the children illegitimate, and therefore their settlement could not be derived from him in *Stoke Golding*, agreed to take the paupers, *Sarah* and the children, back again; and did accordingly take them back; and the order of removal as to them was considered to be at an end. That afterwards, and before the Sessions, a new order was made, removing *Sarah* and the children from *Castle Donington* to *Sibston*; against which *Sibston* appealed; and the Sessions were of opinion that the former order of removal not having been regularly appealed from, and quashed, was conclusive on *Stoke Golding*, and for that reason were proceeding to quash the second order of removal to *Sibston*. That the attorney for *Stoke Golding* happening to be in court then desired that their appeal against that first order might be heard; but the justices refused, (although it was the first session after the order made.) He then proposed that the Sessions would permit the case to be stated for the opinion of the Court of King's Bench, whether the first order under these circumstances were conclusive: but this was also refused. The Court granted a rule to shew cause.

"Mr. *Bearcroft* and Mr. *Dayrell*, in the next term, shewed cause, on the ground that it is the custom at *Leicester* for all appeals to be entered on the first day of the sessions; but this was presented afterwards: and that agreeing to take the party back was nothing.

"Mr. Justice *BULLER* said, they ought to have proceeded on the appeal: they were bound to receive it: it was presented at the next sessions. *Per Cur.* Rule absolute for *mandamus*."]'

The Court said, that the application was a reasonable one, and they ought to grant it. The parish officers of *North Bradley* were prepared to enter their appeal at the proper time, and were only prevented from doing so by the agreement of the other parish, which then rendered it unnecessary. No fault was

imputable to them. The *mandamus*, therefore, should go to the justices to receive and enter the appeal *nunc pro tunc*, and enter continuances.

Rule absolute.

Spencer v. Hall.

1 East, 688. June 25, 1801.

Where a defendant residing in town at the issuing of the writ changes his residence permanently to the country, at the distance of above 40 miles from town, before the delivery of the issue, he is entitled to 14 day's notice of trial.

THIS was a rule calling upon the plaintiff to shew cause why the verdict obtained by him in this cause should not be set aside with costs for irregularity. The venue was laid in *Middlesex*; and the defendant was living there at the time of issuing the writ; but before the delivery of the declaration he quitted that residence, and went to reside permanently at *Worcester*: and notice of this was given to the plaintiff's attorney before the declaration was delivered: notwithstanding which the issue was delivered on the 11th of *May*, with notice of trial for the sittings after last *Easter* term, which commenced on the 19th of the same month. And the question was, Whether the defendant, having a settled residence in town at the commencement of the action, though afterwards removing to the distance of above 40 miles off, was entitled to 14, or only to 8 days notice of trial.

Garrow and *Marryatt* shewed cause, and contended for the shorter period, on account of the uncertainty that would generally ensue if the length of the notice were to depend upon the defendant's change of residence subsequent to the issuing of the writ, which might not be known beforehand to the plaintiff, who would thereby lose the opportunity of giving 14 days notice. And this they said had been the general practice; and that the cases in which it had been otherwise considered were where the residence in town at the commencement of the action was only occasional.

Laves, in support of the rule denied that the general practice was such as had been represented. The statute 14 Geo. 2, c. 17, s. 4, on which the question turns has no reference to the commencement of the action; but only directs, "that no cause shall be tried at *nisi prius*, &c. or at the sittings in *London* or *Westminster*, where the defendant resides above 40 miles from the said cities, unless notice of trial in writing has been given at least ten days (and the practice of the Court requires fourteen) before such intended trial." In *Brind v. Torris*, 2 Blac. Rep. 1205, all the antecedent stages of the cause arose in *London*; but yet it was ruled that fourteen days notice of trial was necessary, the defendant having ceased to reside in town before the delivery of the issue. And this was recognised in *Douglas v. Ray*, 4 Term Rep. 552.

LORD KENYON, C. J. (after consulting the other Judges) said, that as it was a question upon the construction of the act of parliament which concerned the practice of all the courts, it should be referred to the Master to inquire into the practice, and confer with the officers of the other courts, in order that all might be regulated by one uniform rule; and then to make his report upon it.

Upon the last day of the term^(a) the Master reported, that he had conferred with the officers of the other courts, and they all agreed that the practice was for the defendant to have the longer notice of trial in these cases⁽¹⁾.

Rule absolute.

(a) The matter was discussed some days before.

(1) But in order to entitle the defendant to this longer notice, he must give the plaintiff previous notice of his removal. *Rockfort v. Robinson*, 12 East, 427. Where the defendant has constantly resided in town from the time of the arrest, though his home is only 40 miles distant, he is entitled only to the shorter notice. *Lloyd v. Hooper*, 7 East, 624.



J U D G E S
OF THE
COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

LLOYD Lord KENYON, Lord Chief Justice.

SUCCEEDED BY

EDWARD Lord ELLENBOROUGH, Lord Chief Justice.

Sir NASH GROSE, Knt.

Sir SOULDEN LAWRENCE, Knt.

Sir SIMON LE BLANC, Knt.

ATTORNEYS—GENERAL.

Sir EDWARD LAW, Knt.

The Honourable SPENCER PERCEVAL.

SOLICITORS—GENERAL.

The Honourable SPENCER PERCEVAL.

THOMAS MANNERS SUTTON, Esq.



CASES

IN

MICHAELMAS TERM,

IN THE FORTY-SECOND YEAR OF THE REIGN OF GEORGE III.

Maylin v. Towshend.

2 East, 1. Nov. 10, 1801.

In an affidavit to hold to bail for 20*l.* and upwards, it is sufficient to negative a tender of the said sum in bank notes; that having reference to the specific sum sworn to, which was such as might be so tendered.

MARRYATT moved to discharge the defendant out of custody on filing common bail, on the ground of a defect in the affidavit to hold to bail; wherein the plaintiff swore, that the defendant was indebted to him *in the sum of 20*l.* and upwards*, for goods sold and delivered, and that no tender had been made of payment of the said sum in bank notes(a). And he referred to a case of *Barnet v. Wheeler*, Hil. 41 Geo. 3, where a similar motion had been allowed on the same and other objections: for *non constat*, that there had not been a tender of all but the fractional part above the 20*l.*, according to the case of *Jennings v. Mitchell*, 1 East's Rep. 17.

But the Court said, that this differed from the case of *Jennings v. Mitchell*; for here the specific sum sworn to was such as might be tendered in bank notes; and a tender of that sum was expressly negatived, which was sufficient; and it had been so ruled in a case subsequent to that of *Jennings v. Mitchell*(1).

Penny v. Porter.

2 East, 2. Nov. 10, 1801.

Upon breach of a contract for the purchase of 100 bags of wheat, 40 or 50 of which were to be delivered on one market day, and the remainder on the next market day, the plaintiff cannot declare as upon an absolute contract for the delivery of 40 bags on the first day, &c. though 40 bags were then in fact delivered: but the contract must be stated in the alternative, according to the original terms of it.

IN an action on the case for the non-delivery of wheat according to agreement, the first count of the declaration stated the contract to be, that in consideration that the plaintiff had agreed to purchase a large quantity, to wit, one hundred bags of wheat, each bag weighing 300*lb.* and for 40 bags, part of the same, to pay to the defendant 1*l.* 16*s.* per bag, and for the remaining 60 bags to pay the market price at the then next market day; the defendant

(a) Pursuant to the provisions of the Bank Act, 37 Geo. 3. c. 45. s. 9.

(1) Vide *Ford v. Lover*, 3 East 110.

undertook to sell and deliver to the plaintiff 40 of the bags immediately, and the remaining 60 bags at the then next market day at the stipulated price. It then averred the sale and delivery of the first 40 bags in part performance of the contract, and set forth a breach as for the non-delivery of the remainder. The third count was similar in form, only stating the contract to be for the sale of 100 bags of wheat, 50 bags of which were to be sold and delivered immediately at the price mentioned, and the remaining 50 bags at the next market day, for the then market price. The contract was laid more generally in other counts. At the trial before *Le Blanc, J.* at the last assizes at *Bristol*, the contract proved was, that the defendant was to let the plaintiff have 100 bags of wheat, *forty or fifty* bags to be delivered at the then present market for the stipulated price, and the remainder at the following market, for the then market price. And further it was proved, that the defendant immediately after delivered 40 of the bags, but did not deliver the remainder at the next market day. The question was, Whether the contract proved, being optional in the defendant to deliver 40 or 50 bags the first day, and the remainder the next market day, sustained the first count stating the contract to be positively for the delivery of 40 bags on the first, and the remainder on the subsequent, market day, inasmuch as the defendant had decided his option by the delivery in fact of the 40 bags in the first instance? The jury, being of opinion that the defendant had an option to deliver 40 or 50 bags in the first instance, found a verdict for him under the learned judge's direction: and leave was given to move to set the verdict aside, and enter a verdict for the plaintiff for *3l. 12s.* damages, if the Court should be of a different opinion.

This matter was once before agitated in this Court in *Hilary* term last, when it underwent great discussion. It then came on upon a rule for setting aside a nonsuit in the first trial before Lord *Eldon*, at the preceding summer assizes, on the ground of the variance mentioned between the declaration and the evidence: and a new trial was granted on the ground of some uncertainty in the evidence, as to what the real contract was, which the Court thought should have been left to the jury to decide. But they then intimated a strong opinion, that if the contract were found to have been optional in the first instance, it could not be laid as an absolute contract for a certain number of bags, though in the event of the party's election of one of the alternatives^(a).

Lenz, Serjt. now moved to enter the verdict for the plaintiff, on the ground, that though the contract were optional in the defendant in the first instance, yet he having made his election to deliver 40 bags on the first day, thereby put an end to the option; and it might then be declared on as an absolute contract in effect to deliver those 40 bags on the first day, and the remaining 60 on the subsequent market day.

The Court, however, were of a different opinion, and held that the contract must be stated in the declaration according to the original terms of it, which made it optional in the defendant to deliver 40 or 50 bags in the first instance, and not an absolute contract for the delivery of either of those quantities⁽¹⁾.

Rule refused.

(a) On that occasion *Bond* and *Pell* argued in support of the rule for setting aside the nonsuit; and *Gibbs* and *Dampier, contra*. The following cases were referred to in the course of their arguments. *Layton v. Pearce*, Dougl. 15. *Churchill v. Wilkins*, 1 Term Rep. 447. *Tate v. Wellings*, 3 Term Rep. 581. *White v. Wilson*, 2 Bos. & Pull. 116. and a case of *Shipham v. Saunders*, East. T. 1783, where the contract in effect was to deliver goods within 14 days, or as soon as a certain vessel arrived; the vessel arrived after the 14 days; and on breach of the contract by non-delivery, the plaintiff declared in one count on a contract by the defendant to deliver within 14 days, and in another count to deliver on the arrival of the ship; but there being no count laying the contract in the alternative, the Court held the variance fatal.

(1) Vide *White v. Wilson*, 2 Bos. & Pull. 119. *Miles v. Sheward*, 8 East 8. 1 Chitt. Plead. 302.

The King v. Higgins.

2 East, 5. Nov. 11, 1801.

To solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. And such offence is indictable at the Sessions, having a tendency to a breach of the peace.

THE defendant was indicted for a misdemeanor at the quarter sessions for the county of *Lancaster*, and was convicted on the second count of the indictment, charging, "That he on, &c. at, &c. did falsely, wickedly, and unlawfully solicit and incite one *James Dixon*, a servant of *J. Phillips*, &c. to take, embezzle, and steal a quantity of twist, of the value of three shillings, of the goods and chattels of his masters *J. P.*, &c., aforesaid, to the great damage of the said *J. P.*, &c. to the evil example, &c. and against the peace," &c. After judgment of the pillory and two years' imprisonment, a writ of error was brought, and the following causes assigned for error: 1. That the said count does not set forth any misdemeanor or offence which the justices of peace at their quarter sessions had jurisdiction to determine. 2. That it does not appear that *J. Dixon*, the principal, was ever convicted of the felony wherewith the defendant appears to be charged, as accessary before the fact. 3. The general error.

The case was twice argued; first, in *Trinity* term last by *Scarlett* for the defendant, and *Cross* for the crown; and now by *Topping* for the defendant, and *Christian* for the crown.

For the defendant it was urged, 1st, That the count in question contained no charge of any matter indictable at common law. It is not every act, immoral in itself, or of evil example, which is indictable, although it may subject the party to find sureties of the peace. A bare solicitation or incitement of another to commit an offence is not indictable, unless it be accompanied by some overt act towards carrying the intent into execution; but if no such act be done either by the inciter or the party solicited, it is nothing more, as *Mr. Justice Foster* observes, than a mere fruitless ineffectual temptation. Now here it is not stated how or by what means the defendant solicited *Dixon* to commit the felony; nor that any act was done by the defendant, such as offering money or the like, to forward such solicitation; nor that any act by *Dixon* followed thereupon. It must, therefore, be presumed, that nothing of this sort happened, as there can be no latitude of intendment in criminal cases to include any thing more than is charged. *R. v. Wheatley*, 2 Burr. 1127. It stands, therefore, as a mere wish or desire of the defendant to do an evil act. If indeed any evil consequence ensue on such a solicitation, the party is answerable; but there is a *locus penitentiae* between the solicitation and the act, and if he countermand the act before it be done, he is absolved from the consequences. An argument may be derived from analogy to cases of slander; for if no action would lie for imputing such a bare solicitation to another, it follows that the solicitation itself cannot be indictable. In *Bray v. Andrews*, Moor 63, the words were, "My master was not content to take my living from me, but sent his man *Andrews* to kill me." Two of the judges thought the action lay, though no effect followed upon the command: but the other two held otherwise; because no action lies for slander except on the imputation of such things as are punishable by law; and it was never seen that any punishment was appointed either by the common or statute law, if no effect ensued thereupon. So in 1 Roll. Abr. 50. Q. pl. 2. If a man say of another, "that he lay in wait to rob him," an action lies; for there is the imputation of an evil act done. But in the same book, pl. 4, where the words were, "that he keepeth men to rob me," it is said no action lies; because they

only impute a bare intention without any act. The same principle is clearly laid down in *Murray's case*, 2 Bulstr. 206, and in *Crofts v. Brown*,^(a) and in *Eaton v. Allen*, 4 Co. 16 b: *Bracton*, lib. 3. fo. 128, pl. 13, observes, "ubi factum, ibi poterit esse forcia quandoque, sed nunquam forcia sine facto;" (which word *forcia*, says Lord *Coke*, 2 Inst. 182, is a word of art, signifying the furnishing a weapon of force to do the fact, by force whereof it is committed, the party furnishing the weapon not being present at the fact:) "quia ubi principale non consistit, nec ea quæ sequuntur locum habere debent: sicut dici poterit de præcepto, conepiratione, et consimilibus, quamvis hujusmodi esse possunt etiam sine facto; et quandoque puniuntur si factum subsequatur, sed sine facto non, &c. nec etiam obesse debent præceptum, &c. nisi factum subsequatur." *Vaughan*, Poph. 134, was indicted for persuading an apprentice to withdraw himself from his master, so that he should not be taken upon a warrant; and *Haughton*, J. excepted to the indictment because no venue appeared, not that the apprentice did hide himself from the warrant; for if he did not so, the persuasion was nothing. In *R. v. Daniel*, 1 Salk. 380, the indictment charged that he inticed away an apprentice from his master, and seduced him to take and carry away certain goods of his master from his house, and that the defendant knowingly received the same. It was objected, that this was but a private and not a public injury; that case only lies, and not trespass for inticing away a man's servant; that no fact was laid to be done in pursuance of such inticing, except as to the latter part of the charge respecting the carrying away the goods, as to which that no venue was laid where the goods were taken away: for which reasons the judgment was arrested. The same case is reported in 3 Salk. 191(b), where the indictment is said to have been holden nought by all the Court for not averring that the apprentice did absent himself: for though the words *absentare causavit* imply that he did absent himself; yet the indictment must not only shew the cause but the effect which followed. The same case is most fully reported in 6 Mod. 99, where Lord *Holt* says, that advising one to rob or kill, *without something be done thereupon*, is not indictable. And he agreed, that a conspiracy to charge one with a bastard child is indictable; but if one should advise another to do it without more, it would not. And this report also agrees, that the indictment was holden ill by the whole Court for want of an express allegation that the servant did absent himself. And herewith agrees the opinion of *Powell*, J. in 6 Mod. 182, S. C. Lord *Holt*, indeed, afterwards said, 6 Mod. 101, that he was not satisfied, that to seduce one's servant away was indictable; but to persuade him to embezzle his master's goods was: but whether it were necessary to allege that the servant had embezzled them? for the indictment might perhaps be for the evil act of persuading. This latter opinion, however, was expressed with doubt: and it appears that Lord *Holt* did not adhere to it in the subsequent case of *Reg. v. Callinwood*, 2 Ld. Raym. 1116. That also was an indictment for inticing an apprentice to take goods from his master, and afterwards receiving the goods knowing them to be the master's, and converting them to his own use. Judgment was given for the defendant on the authority of *Reg. v. Daniel*. And to an exception taken to the indictment that it did not aver that the apprentice took away the goods, and that it was not enough to say that the defendant received them; Lord *Holt* said, that it should have been laid that the defendant seduced the apprentice, and that the apprentice *vi et armis* took away the goods. Though he also thought, that the indictment might have been general against the defendant for taking away the goods; for he was a taker. In another report, 6 Mod. 288, of the same case it is stated, that all

(a) 8 Bulstr. 167. See vide *Dean v. Eaton*, 1 Bulstr. 201.

(b) Lord *Kenyon* observed, that the authority of the third part of *Salkeld* was not to be relied on, unless corroborated by other books; and it had been often denied by Mr. Justice *Foster*.

the Court were of opinion that it was not enough to lay an incitement without an act done in pursuance of it. And another report, 3 Salk. 42, is to the same effect. In none of the books is there any case or precedent to be found of an indictment for a bare solicitation to commit an offence without an act done in pursuance of it: and the silence of all the writers on the crown law on this subject is of itself a strong argument that no such offence is known to the law. The general principle of our penal code is to punish the act, and not the intent; with the single exception of high treason, where the traitorous intent constitutes the crime; but even there it must be manifested by some overt act. Nothing is here stated which necessarily imports that any act was done towards the commission of the offence solicited; a man may incite by words as well as acts. 2dly, It is uncertain upon the face of the indictment whether the felony solicited were afterwards committed or not; the word *incite* is in that respect ambiguous: but as the soliciting a felony can only be a misdemeanor in case the felony be not committed, it ought to be expressly averred that no felony was committed; though it may not be necessary to prove such a negative. But 3dly, supposing the offence charged to be a misdemeanor, and that it is well laid in point of form; yet the Quarter Sessions had no jurisdiction to try it, inasmuch as it is no breach of the peace. That Court being composed of judges deriving their authority from statute(a) can only derive jurisdiction from the same source. The stat. 1 Ed. 3. st. 2. c. 16, assigned justices to keep the peace. The stat. 4 Ed. 3. c. 2, which made the same provision, also assigned other justices to deliver the gaols of such whose indictments were taken before justices of the peace. The stat. 18 Ed. 3. st. 2. c. 2, for the first time gave them jurisdiction to try trespasses in general as well as felonies. This is confirmed by stat. 34 Ed. 3. c. 1. The commission of the peace(b) in a sweeping clause gives them authority to inquire of all trespasses, &c. and of all other offences of which justices of the peace may lawfully inquire; and particularizes a number of offences, not including the offence in question. In the construction of this clause Lord Coke says, that the latter words, "of which justices," &c. qualify the generality of the former: and *Hawkins*, lb. s. 38, defines trespasses in a large sense to mean not only all inferior offences which are properly and directly against the peace, as assaults and batteries, and such like; but also all others which are only so by construction. It is true he goes on to add, "as all breaches of the law in general are said to be(c);" yet he immediately states forgery and perjury as exceptions(d); which he founds upon this consideration, that the word *trespass* is to be taken in its proper and natural sense, namely, to mean personal wrongs and open violence, or at most to extend to such other offences only as have a direct and immediate tendency thereto, as libels and such like. Now it cannot be said, that a bare inciting of one to do an illegal act, which implies that it is done in a secret manner and without force, is either a direct breach of the peace, or has a direct and immediate tendency thereto.

On the part of the crown it was contended, that every attempt to commit a crime, whether felony or misdemeanor, is itself a misdemeanor and indictable, *a fortiori* in the former case. And if an act be necessary, the incitement or solicitation is an act: it is an attempt to procure the commission of a felony by the agency of another person. By the incitement the party does all that is left for him to do to constitute the misdemeanor: for if the felony be actually committed, he is guilty of felony as accessory before the fact. In high

(a) Vide 2 Hawk. ch. 8. s. 18. *et sequent.*

(b) Vid. ib. s. 28. *et sequent.*

(c) In *R. v. Lane*, an indictment for exercising the trade of a barber without serving to it seven years was quashed, because it was not laid *contra pacem*; for every breach of the law is against the peace. 6 Mod. 128.

(d) Vide *R. v. Farrington*, 1 Salk. 406, and *R. v. Gibbs*, 1 East R. 173.

treason, though the rule still holds that *voluntas reputabatur pro facto*, and therefore the compassing the king's death is the substantive treason; yet this must be proved by some overt act or *apertum factum*, 4 Inst. 5, in margin. And both Lord Coke, Ib. 6, and Mr. Justice *Foster*, Fost. 195, agree, that any advice, persuasion, or command, to incite or encourage others to commit the fact, is an overt act of treason. If he who procures a felony to be committed by another be himself a felon, Fost. 125, it follows that he who attempts to procure it attempts to commit a felony. The gist of the offence then is the attempt or endeavour; the manner of doing it is matter of evidence, and need not be laid in the indictment. In *R. v. Fuller*, 1 Bos. & Pull. 190, the charge of endeavouring to incite a soldier to mutiny, &c. was holden to be well laid in an indictment on the st. 37 Geo. 3, c. 70, without stating the means employed. And in *Johnson's* case, 2 Show. 1, the endeavour to commit an offence was said to be as criminal as the offence itself. The argument from analogy to cases of slander is in favour of the prosecution; for the principle is, that no action lies for the imputation of any thing, which, if done by the party, would not have subjected him to punishment. Now in *Leverage v. Smith*, Cro. Eliz. 710, all the Court held, that an action well lay for these words: "*John Leverage* would have robbed the house of *J. S.* if *J. D.* would have consented unto it: he persuaded *J. D.* unto it, and told him he would bring him where he should have money enough." Although the words themselves import no act done, but only an evil intent, as was objected in that case. So in *Passie v. Mondford*, Ib. 747, the words were, that the plaintiff "sent a letter to the defendant's master, and therein willed him to poison his wife," which were objected not to be actionable because no act was done; but the Court resolved otherwise, because it was a great slander to *will one to do such an act*; and this judgment was approved in *Deane v. Eton*, 1 Bulstr. 201, although, as was there said, no act were done. Again, in *Froude v. Froude*, 2 Lev. 205, the words were "*F.* went to *D.'s* house, and would have had him rob *B.'s* house, and he (*inuendo*, the plaintiff) did rob him." It was objected, that it was uncertain by the words who robbed him. But the Court held, that the first words were of themselves actionable, and made worse by the second, whether the robbery were imputed to be done by the plaintiff or by his procurement. The cases of *The Queen v. Daniel*, 1 Salk. 380. 6 Mod. 100, and *The Queen v. Callingwood*, 2 Ld. Raym. 1116, did not decide that it was necessary an act should be done to sustain an indictment, or that the persuading another was not an act. The true points on which the former case turned are stated in the latter case, 6 Mod. 299, to have been, 1. The seducing an apprentice from his master; which was the only point in judgment, and was holden not to be an indictable offence, but a mere private injury. 2. The persuading him to take away his master's goods; as to which no venue was laid. *Callingwood's* case also went off on the latter ground: and besides, the indictment there did not lay a persuasion to steal, but only to take and carry away his master's goods, which might be only a civil injury. In *R. v. Best* and others, 2 Ld. Raym. 1167, which was an indictment for a conspiracy to charge a man as the father of a bastard, it was objected that without an act done it was no crime, and that the indictment alleged nothing but that the defendants conspired to tell the prosecutor that he was the father of the child of which *E.* was enceint. But judgment was given for the crown. The same kind of objection was urged in *Rex v. Kinnersly and Moore*, 1 Stra. 193, where it was urged that bare words, charging another with endeavouring to commit sodomy, were not a sufficient overt act, without alleging something actually done towards putting the conspiracy in execution. But the objection was unanimously over-ruled; and several instances were mentioned of attempts to commit felonies being punished as misdemeanors. In *R. v. Sutton*, 2 Stra. 1074, the having tools for coining in possession, with intent only to use them was holden indictable. So in *The King v. Plympton*, 2 Ld. Raym. 1377, the promising

money to a member of a corporation to induce him to vote for the election of a mayor; though the objection would equally have holden there, that nothing but words passed which were no act. The same principle governed the case of *R. v. Vaughan*, 2 Burr. 2494, where information was granted against the defendant for attempting to bribe a privy counsellor to procure him an office in the colonies; and the like was lately exhibited against *Young*, for attempting to influence a juryman in giving his verdict. But if there were any doubt on principle, and on former authorities, the case of *Rex v. Scofield*, Cald. 397, is directly in point. It was there holden, that the attempting to set fire to a man's own house, which is only a misdemeanor, was itself a misdemeanor *per se*, as much as an attempt to commit a felony, though differing in degree. There indeed was an act done: but another case was there cited before *Adams, B.*, at *Shrewsbury*, which cannot be distinguished from the present; where an indictment charged a defendant with an attempt to suborn one to commit perjury; which upon reference to the judges was unanimously holden to be a misdemeanor. 2dly, It was not necessary to negative in the indictment, that the felony solicited was committed; for no felony can be presumed if it be not specifically charged. In *R. v. Bacon*, 1 Sid. 230; 1 Lev. 146; 1 Keb. 809, which was an indictment for inciting to the death of another by offering a reward for that purpose, the murder itself was not negatived. Nor in any of the cases for soliciting felony is any similar averment introduced. It was, however, open to the defendant to have defended himself by proof of the felony committed. 3dly, The quarter sessions have jurisdiction by the words of their commission over all *trespasses*; and this is explained by *Hawkins*, 2 Hawk. ch. 8. s. 38, to include not only all inferior offences properly and directly against the peace, but also all such as are only so by construction, as all breaches of the law in general are said to be; with the exceptions only of perjury and forgery; which exceptions rest more upon authority than principle. And at least the solicitation of a felony has as much a tendency to a breach of the peace as a cheat, over which it is acknowledged the sessions have jurisdiction.

In reply to the cases cited on the part of the crown, it was observed, that in *Fuller's case*, 1 Bos. & Pull. 180, the indictment was framed on the wording of the stat 37 Geo. 3, c. 70, which made the endeavoring to incite a soldier to mutiny a substantive offence. And in *Leverage v. Smith*, Cro. Eliz. 710, the words imply an endeavour by some act of the party himself to commit the felony imputed. In *Passie v. Mondford*, lb. 747, the sending the letter was an act imputed. So in *Dean v. Eton*, 1 Bulstr. 201, the placing the woman in the house with the intent alleged: and in *Froude v. Froude*, 2 Lev. 205, the words spoken contained an actual charge of felony committed. The cases of *R. v. Best*, 2 Ld. Raym. 1167, and *R. v. Kinnersly and Moore*, 1 Stra. 193, being cases of conspiracy, are clearly distinguishable from the present. *R. v. Vaughan*, 4 Burr. 2494, *R. v. Plympton*, 2 Ld. Raym. 1377, and *R. v. Young*, were cases of bribery, which is a specific offence, in which it is immaterial whether the bribe were given or only offered. Lastly, in *Scofield's case*, Cald. 397, which has been most relied on, there was a direct act done by him, namely, an attempt to set fire to his own house, and not a bare solicitation of another to do it. Still further in *Sutton's case*, 2 Stra. 1074, there was an actual attempt to commit high treason, by having tools for coining in his possession for that purpose. And in *Johnson's case*, 2 Show. 1. besides that the report is not very intelligible, several acts are mentioned to have been laid in the information, such as, the giving money, and the putting it in a chest, to be paid upon the event of a verdict; but above all, the offence charged, which was in effect the tampering with a witness before a trial, to give evidence for a corrupt consideration, was in itself a specific offence against public justice.

Lord KENYON, C. J. The offence imputed to this defendant is of the most

serious kind, no less than, that for his own wicked gains he solicited and incited a servant to rob his master; and can it be a question in a country professing to have laws subservient to justice and morality, Whether this be an offence? So it is, however, that a great number of cases have been cited, some of which, I confess, have tended, not to enlighten, but to perplex my mind. But it is matter of satisfaction, that the more modern cases have gotten rid of a great deal of jargon on the subject. I dismiss at once from my consideration all the cases of actions for slander. And I am satisfied that some of the propositions which are stated in the books referred to could not have come from the judges to whom they are imputed. As for example, when Lord *Holt* is stated (a) to have said, that if one should advise another to charge a person with a bastard, (by which it must be understood that the charge was ill founded,) it would not be indictable. I do not believe that he said so; for it must be remembered, that such a charge is made upon oath, and he could never have said that to suborn a witness to commit perjury was no offence, although the perjury were not alleged to have been committed. But if he had delivered such an opinion, it is a sufficient answer, that the contrary has been expressly adjudged in more modern times by all the judges in the case alluded to, before Mr. Baron *Adams* at *Shrewsbury*, which was quoted in the case of *The King v. Scofield*: and God forbid that it should not be considered as an offence. But it is argued, that a mere intent to commit evil is not indictable, without an act done; but is there not an act done, when it is charged that the defendant solicited another to commit a felony? The solicitation is an act; and the answer given at the bar is decisive, that it would be sufficient to constitute an overt act of high treason. The case of *The King v. Vaughan* was not passed over slightly. It was there attempted to be maintained, that an attempt to bribe the Duke of *Grafton*, then a cabinet minister, and a member of the privy council, to give the defendant a place in *Jamaica* was not indictable. Lord *Mansfield* rejected the attempt with indignation. It was a solicitation to the duke to commit a great offence against his duty to the king and the public. So it is here: and it would be a slander upon the law to suppose that an offence of such magnitude is not indictable. I am also clearly of opinion, that it is indictable at the quarter sessions, as falling in with that class of offences, which, being violations of the law of the land, have a tendency, as it is said, to a breach of the peace, and are therefore cognizable by that jurisdiction. To this general rule there are, indeed, two exceptions, namely, forgery and perjury; why excepted I know not; but having been expressly so adjudged, I will not break through the rules of law. No other exceptions, however, have been allowed, and therefore this falls within the general rule.

GROSE, J. This is a very grievous offence, and it is most important to the public to be made known as such. Nevertheless, if it be no offence to incite a servant to steal from his master, or if the offence be not properly laid in point of form, or if the sessions have no jurisdiction to inquire of it, then the judgment must be arrested. First, as to the offence itself, it must be admitted that an attempt to commit a felony is in many cases at least a misdemeanor; to instance the common cases of an attempt to rob or to ravish, which are indictable offences in every day's practice. But further, an attempt to commit even a misdemeanor has been shewn in many cases to be itself a misdemeanor. Then if so, it would be extraordinary indeed if an attempt to incite to a felony were not also a misdemeanor. If a robbery were actually committed, the inciter would be a felon. The incitement, however, is the offence, though differing in its consequences, according as the offence solicited (if it be felony) is committed or not. The guilt of an accessory before is in many cases as great as that of the principal; sometimes indeed it is even deserving

(a) *Vide Regina v. Daniel*, 6 Mod. 100.

of greater punishment. For the principal is often put upon committing the offence by the accessory before, and is instructed by him how to perpetrate it, in order that he may be benefited by becoming the receiver of the goods after they are stolen. It is said, however, that there is no instance of a mere solicitation to another to commit a felony being adjudged a misdemeanor; and it was attempted to be distinguished from the case of *Rex v. Scofield*: but that case, though not immediately in point, is in truth much stronger than the present; for there an attempt to commit a misdemeanor was holden indictable; and the cases of *R. v. Vaughan* and *R. v. Plympton* were expressly recognized, which come still nearer to the present; nor was the case of *R. v. Johnson* denied to be law, which was a solicitation to commit perjury, and which had been cited in the course of the argument. All these cases prove, that inciting another to commit a misdemeanor is itself a misdemeanor: *a fortiori*, therefore, it must be such to incite another to commit felony. It is also objected, that some act should be laid to have been done in pursuance of the incitement: but I do not remember any case where such an averment has been holden to be necessary; nor can it be deemed so, if, as I conceive, the gist of the offence is the incitement: and indeed if the incitement were to commit felony, and the fact were committed, the inciter would himself be a felon. Neither was it necessary, in order to shew that this was only a misdemeanor, to negative the commission of the felony. None of the precedents of indictments for attempts to commit rape or robbery contain any such negative averment. But it is left to the defendant to shew if he please that the misdemeanor was merged in the greater offence. Then as to the question of jurisdiction, I am clearly of opinion that there is no foundation for the objection. The passage cited from *Hawkins* appears to me to be good law, and it goes the whole length of shewing that the Sessions have jurisdiction in this case. The offence tends to a breach of peace: and no good reason can be assigned why that Court should not have jurisdiction over such offences. As to the reasoning drawn by analogy from actions for slander, it is in support of this indictment; and I should think such an action would lie for accusing a man of doing what this defendant is here charged to have done.

LAWRENCE, J. Three objections were taken to this indictment: 1st, That it is uncertain on the face of it whether *Dixon* did not steal the goods; and that if he did, then the offence would be felony and not a misdemeanor. 2dly, That a mere intent to commit a crime is not indictable. 3dly, That the justices in sessions had no jurisdiction. As to the first, there is no pretence for it; for it cannot be intended that a felony was committed where none is so charged. In 2 Hawk. ch. 25, s. 60, it is laid down, that the want of a direct allegation of any thing material in the description of the substance, nature, or manner of the crime, cannot be supplied by any intendment or implication whatsoever. And an instance is given from Keilw. 87, wherein it was adjudged, that an indictment against one for feloniously breaking such a prison, and commanding another who was therein imprisoned for felony to escape, was not a good indictment for a felonious breaking, without expressly shewing that the party did escape; and yet the breaking could not be felonious as it was laid, unless there was an escape. Therefore, as there is no averment here that *Dixon* did steal the goods, it must be taken that he did not. 2dly, All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable. Then the question is, whether an attempt to incite another to steal is not prejudicial to the community? of which there can be no doubt. The whole argument for the defendant turns upon a fallacy in assuming that no act is charged to have been done by him; for a solicitation is an act. The offence does not rest in mere intention; for in soliciting *Dixon* to commit the felony, the defendant did an act towards carrying his intent into execution. It is an endeavour or attempt to commit a crime. The argument, therefore, for the defendant, must go the length of

shewing that an endeavour or attempt to commit a felony is no offence, not even a misdemeanor, if the felony be not committed: for if the felony had been committed by the servant, the defendant himself would have been a felon. The doctrine laid down by Lord *Mansfield* in *R. v. Scofield*, which comprises all the principles of the former decisions, entirely governs the present case; that so long as an act rests in bare intention, it is not punishable by our laws; but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. That case is ably reported, and contains every thing convincing which can be said on the subject. There are, however, older authorities to the same purpose. *R. v. Lady Lowly*, Fitzg. 263, was an indictment charging that the defendant, knowing that J. C. was indicted for forgery, *endeavoured* to keep away a material witness for the king: on which there was judgment for the crown. The case alluded to in *R. v. Scofield*, as tried before Mr. Baron *Adams* at *Shrewsbury*, is in point; and I have precedents of similar indictments, one of *The King v. Broom* in *Northumberland*, drawn by Mr. Justice *Yates* when at the bar. Another against *Guy* and another, drawn by Mr. Justice *Ashhurst*, for soliciting one to kill the Chevalier *D'Eon*(a). 3dly, The objection to the want of jurisdiction is founded on a mistaken supposition that the Quarter Sessions can only take cognizance of offences which are direct breaches of the peace; for their jurisdiction also extends to such offences as *tend* to a breach of the peace. 2 Hawk. ch. 8. s. 38, is in point; and this is confirmed by the judgment of the Court in *Rex v. Rispal*, 3 Burr. 1320, which was a conspiracy to charge a man with taking hair out of a bag; and it was holden that the offence was cognizable by the Sessions; a conspiracy being a trespass, and tending to a breach of the peace.

LE BLANC, J. It is contended, that the offence charged in the second count, of which the defendant has been convicted, is no misdemeanor, because it amounts only to a bare wish or desire of the mind to do an illegal act. If that were so, I agree that it would not be indictable. But this is a charge of an act done; namely, an actual solicitation of a servant to rob his master, and not merely a wish or desire that he should do so. A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by the several cases referred to. The cases of *R. v. Daniel*, and *R. v. Callingwood*, cited for the defendant, do not support the proposition that a mere solicitation is not indictable: on the contrary, Lord *Holt* says in the former case, 6 Mod. 101, that perhaps an indictment might be *for the evil act of persuading* another to steal. That part of the case, however, was determined upon the want of a venue. And in *R. v. Callingwood*, 2 Ld. Raym. 1116, the only point determined was, that the first part of the charge, which was for enticing an apprentice to take and carry away goods from his master, was not indictable, being only a private injury for which an action on the case would lie, but not of such a public nature as to maintain an indictment: and that the second part of the charge was not well laid for want of a venue. Then as to the objection that the Quarter Sessions had no jurisdiction in this case, it is sufficient to answer, that the general words of the commission of the peace comprehend all trespasses; and the word *trespasses* not only includes direct breaches of the peace, but also all such offences as have a ten-

(a) That was an indictment against two for soliciting and endeavouring to persuade and procure one *O. M'Allerton*, to kill and murder the Chevalier *D'Eon*. A 2d count charged them with conspiring to take and seize him, and carry him against his will to parts beyond the seas. The 3d count was for a like conspiracy, and also charged that the defendants lay in wait for that purpose.

dency thereto; and on that ground conspiracies have been holden to be cognizable by the Sessions; not as actual breaches of the peace, but as tending thereto. And it appears to me that this is an offence tending to a breach of the peace, and is therefore indictable before that jurisdiction⁽¹⁾.

Judgment affirmed.

Elliott v. Duggan.

2 East, 24. Nov. 12, 1801.

Where the principal resides here, it is not sufficient for his agent in an affidavit to hold to bail to negative a tender of the debt in bank notes to the best of his knowledge and belief; but such tender must be positively negated.

THE affidavit to hold to bail in this case was made by one J. C., stating himself to be agent to the plaintiff, and swearing positively to a debt of 20*l*. for goods sold and delivered, and that no offer had been made to pay that sum or any part thereof in bank notes, to the best of the deponent's knowledge and belief.

Const obtained a rule *nisi* for discharging the defendant on common bail, for the defect of the affidavit in not positively negating a tender of the debt in bank notes, as the act 37 Geo. 3. c. 45, requires; the plaintiff living in *England*, and therefore the case not falling within the exception where the principal with whom the debt was contracted is abroad.

Lambe now shewed cause, and admitted that the objection would have been well founded according to the case of *Cass v. Levy*, 8 Term Rep. 520; but said, that in a subsequent case of *The Mayor of London v. Dias*, 1 East's Rep. 237, an affidavit sworn in the present manner by a clerk in the chamberlain of *London's* office was holden to be sufficient, though the chamberlain himself, who was the principal officer in that respect, was in *England*. But

The Court said, that was the case of a corporation and an exception to the general rule, which in the case of individuals requires a positive negative of a tender of the debt in bank notes where the principal resides here^(a).

Rule absolute.

The King v. The Inhabitants of Coppull.

2 East, 25. Nov. 12, 1801.

A settlement by being rated and paying rates cannot be proved by evidence of paying only, without the production of the rate, or accounting reasonably for the non-production of it; although the payer was both owner and occupier of the estate for which he paid the rate.

TWO justices by an order removed *Henry Bentham*, his wife, and three children by name, from the township of *Standish with Langtree* to the township of *Coppull*, both in the county of *Lancaster*. The Sessions on appeal confirmed the order, subject to the opinion of this court on a case, stating, That the respondents proved by the evidence of the pauper, that his father many years ago purchased a small estate for less than 30*l*. in the township of *Coppull*, and occupied it himself for about five years, during which time the pauper was part of his father's family; and that the pauper's father during his occupation of the estate actually paid the parish rates or assessments in respect of his estate: but the respondents did not produce any rates or assessments, and had not given any notice for the production of the assessments or rates. The

(1) Vide *The King v. Philippa*, 6 East 464.

(a) But a direct negative of such tender sworn by the agent himself is sufficient. *Knight v. Keyte*, 1 East's Rep. 415.

appellants objected, that without the production of them, or having given notice to produce them, there was no legal or proper evidence that the pauper's father was charged for the same.

Topping and Scarlett, in support of the order of Sessions, said, that the production of the rate was only necessary where it stood uncertain or indifferent who is rated for the estate, whether the owner or occupier: but here it was unnecessary to be produced, because as the pauper's father was both owner and occupier, no other person could be rated; and it was enough to shew that he had in fact paid the rate; and they referred to *R. v. St. Issy*, Burr. S. C. 826, where the like objection was taken to a settlement gained by being rated and paying to the land-tax, because the rate itself was not produced, nor any notice given to produce it: but the Court there over-ruled the objection, and treated it as a clear case.

Cross was to have argued contra.

Lord KENYON, C. J. It is impossible to argue that parol evidence may be given of rates which are not produced, nor any notice proved to produce them, nor any reasonable account given for their non-production. The best evidence was not given which the nature of the thing would admit of.

GROSE, J. It is in every day's experience to reject parol evidence of a writing which may and ought to be produced.

Per Curiam,

Both Orders quashed.

The King v. The Inhabitants of Chadderton.

2 East, 27. Nov. 12, 1801.

Where a case from the Sessions only stated the bare fact of a pauper's having received relief from the respondent's parish, it was holden that this was not even *prima facie* evidence of a settlement there, since he might have been relieved as casual poor, which the overseers were bound to do if wanted, whether the pauper were settled there or not. Hearsay evidence of a fact is not to be received upon a question of settlement, though the party who gave the information respecting her own settlement were dead.

TWO justices by an order removed *John Buckley*, his wife, and five children by name, from the township of *Little Bolton* to the township of *Chadderton*, both in the county of *Lancaster*. The sessions, on appeal, confirmed the order, subject to the opinion of this court on the following case:

The respondents proved that the pauper *John Buckley*, when he buried his first wife, applied to and received relief from the overseers of *Chadderton*; and that the pauper's mother, being with child of a bastard some few years after his father's death, went from another township to *Chadderton* to lie in there, and "as the pauper had heard from his mother," who has been dead some years, she was relieved there by *Chadderton*. This hearsay evidence was objected to by the counsel for *Chadderton*; but it was received: and the removants did not give any other evidence of a settlement in *Chadderton*. The Sessions, conceiving the above sufficient evidence of a settlement in *Chadderton*, directed the appellants to go into their case; and the appellants proved that when the pauper was about 12 years of age, his mother and step-father made a verbal agreement with *James Platt* of *Great Bolton*, cotton weaver, that the pauper, who was then able to weave a little, should weave for him three years. The stepfather and mother were to have half the earnings of his weaving, and *Platt* the other half. *Platt* was to learn him to weave and find him looms, but the stepfather and mother were to find him in every thing else. He served out three years with *Platt*, during which time he slept in *Great Bolton*. The *Sundays* he passed with his mother, and the rest of his time at *Platt's*; but this was not mentioned in the agreement.

When this case was called on in the paper for argument,

Lord KENYON, C. J. said, that whatever doubt might be raised as to the

settlement in *Great Bolton*, concerning which he thought the Sessions should have found the fact one way or the other, whether the pauper contracted to serve as an apprentice, or only as a hired servant, in the former of which cases no settlement could be gained, as the binding was not by deed, which Lord Holt says, *R. v. Callingwood*, 2 Ld. Raym. 1117, is necessary in the case of an apprentice; yet at any rate, the orders could not be supported, there being no evidence of any settlement in *Chadderton*, to which the removal was made; the bare fact of the pauper's having been relieved there being no proof of it, as they might have been relieved as casual poor(1).

Holroyd and *Cross*, in support of the orders, observed, that the fact of the pauper's having received relief from the overseers of *Chadderton* was at least *prima facie* evidence of their being there settled, so as to call upon them to account for it by shewing that such relief was given to the paupers as casual poor, or under a misapprehension of their being settled there; nothing of which was stated in the case: and therefore the fact must be taken as equivalent to an acknowledgment by *Chadderton* that the paupers were their parishioners at the time.

LORD KENYON, C. J. The hearsay from the pauper's mother is no evidence at all of any fact(a); and then the only fact applicable to the settlement in *Chadderton* is, that when the pauper buried his first wife he received relief there from the overseers: but the bare fact of his receiving such relief is no evidence of a settlement, for the reason I before gave. If the paupers were in want of relief while they were in *Chadderton*, the overseers were bound to give it, whether the paupers were settled there or elsewhere. And by the late act of parliament, 35 Geo. 3. c. 101, they could not have been removed till they were actually chargeable.

The respondents' counsel then desired that the case might be sent back to the sessions to be reheard, as there was other evidence of the settlement in *Chadderton*; and the subsequent settlement was what was understood to be principally contested.

Topping, contra, said, that both the settlements were contested; and the respondents ought to have come prepared with all their evidence on the trial of the appeal. But

LORD KENYON, C. J. said, that as the respondents might have given other evidence of the settlement in *Chadderton*, if the Sessions had not been satisfied with this, there seemed no impropriety in sending the case back to be reheard; and he would recommend to the magistrates to determine the fact in what character the pauper contracted to serve his master, which would decide the principal question one way or other, and make it unnecessary to send the case back again for the opinion of this Court:

Per Curiam,

The Case remitted to the Sessions

The King v. Airey.

2 East, 80. Nov. 12, 1801.

In an indictment on the st. 30 Geo. 2, c. 24, for obtaining money on false pretences, it is sufficient to allege that the defendant unlawfully, knowingly, and designedly pretended so and so, by means of which *said false* pretences he obtained the money; afterwards negating such pretences to be true; though it be not in terms alleged, that he *falsely* pretended, &c. and it seems it would have been sufficient to allege that he obtained the money by such and such pretences, averring such pretences to be false.

THE first count of the indictment stated, that one *James Barrow*, on the

(1) Vide *The King v. The Inhabitants of Chatham*, 8 East, 498.

(a) Vide *R. v. Ferryfrystone*, post 54, and *R. v. Abergeville*, post, 68. [See also 8 East 542.]

22d of *March*, 40 Geo. 3, &c. at the burgh of *Kirkby* in *Kendal*, in the county of *Westmoreland*, delivered to the defendant *Airey*, late of the burgh, &c. common carrier, certain goods and chattels of the said *J. B.*, to be safely carried by the defendant from the said burgh to one *John Leach* at *Lancaster*, &c. and there to be delivered, &c. for a reasonable hire and reward, &c.; and that the defendant afterwards, to wit, on, &c. at, &c. received the said goods under pretence of carrying and delivering, and then and there undertook to carry and deliver the same accordingly. And that the defendant, contriving and intending to cheat the said *J. B.* of his money, afterwards, to wit, on the 15th of *April* in the year aforesaid, with force and arms, at, &c. unlawfully, knowingly, and designedly, pretended to the said *J. B.* that he the defendant had carried the said goods from the burgh to *Lancaster*, for the purpose of delivering the same to the said *J. L.*, and had there (at *Lancaster*) delivered the same to the said *J. L.*, and that the said *J. L.* had given him the defendant a certain receipt, expressing stch delivery of the same goods to the said *J. L.*, but that he the defendant had lost or mislaid the same receipt, or had left it at home; and that the defendant thereupon demanded of the said *J. B.* 16s. for the carriage of the said goods on that occasion; by means of which said *false pretences*, he the defendant did then and there, to wit, on, &c. with force and arms, at, &c. unlawfully, knowingly, and designedly, obtain from the said *J. B.* 16s., with intent to cheat the said *J. B.* of the same. Whereas in truth and in fact the defendant did not at any time whatsoever carry the said goods, or any part thereof, from the burgh aforesaid to *Lancaster* aforesaid, for the purpose of delivering the same to the said *J. L.*; and whereas in truth and fact the defendant did not at any time before the time of his said pretences, and obtaining the said money as aforesaid, deliver the said goods, or any part thereof, to *J. L.* at *Lancaster*, or at any other place whatsoever; and whereas in truth and in fact, the said *J. L.* never did deliver the said supposed receipt, or any receipt whatever, expressing the said supposed delivery of the said goods to the said *J. L.*; and whereas in truth and in fact, the defendant never received from *J. L.* any receipt whatsoever, concerning the said supposed delivery of the said goods, or any part thereof; and whereas in truth and in fact the defendant never had in his custody or possession any receipt or memorandum whatsoever, relating to the said supposed delivery, &c. There was another count, not materially different as to the present purpose.

After conviction and judgment of transportation for seven years, the defendant brought a writ of error, and assigned for special cause, 1. That it is no where alleged in the indictment, that he did *falsely* pretend any matter or thing to the said *J. B.*, by means of which the said sum of 16s. mentioned to have been unlawfully, knowingly, and designedly obtained by the defendant from *J. B.*, with intent to cheat and defraud him, was so obtained by the defendant. 2. That no false pretence whatever, specifically and positively alleged and charged as such, is alleged and charged in the indictment to have been made or used by the defendant to *J. B.*, by means of which the said sum of 16s. alleged to have been wilfully, knowingly, and designedly obtained by the defendant from *J. B.*, with intent to cheat and defraud him thereof, was so obtained. And also assigned the common error.

Knowlys took objection to the indictment, first, that it is not expressly alleged, that the pretences made by the defendant were *false*, which is the gist of the offence created by the stat. 30 Geo. 2, c. 24, on which alone the indictment can be sustained. The words of the statute are, that "all persons who knowingly and designedly *by false* pretences, &c. shall obtain goods, &c. with intent to cheat any person, &c. shall be deemed offenders." 2 Hawk. ch. 25, s. 60, (which cites Staundf. 96, and Keilw. 86, 7,) says, that the want of a direct allegation of any thing material in the description of the substance, nature, or manner of the crime, cannot be supplied by any intendment or implication whatsoever. And the same author, (s. 110,) adds, that neither the

words *contra formam statuti*, nor any periphrasis, intendment, or conclusion, will make good an indictment which does not bring the fact prohibited within all the material words of the statute ; as *rapuit* in rape ; *voluntarie* and *corrupte* in perjury. Secondly, The omission in charging that the pretences were false cannot be supplied by the words following : “ by means of which said *false* pretences,” &c. for no pretences used were before alleged to be false, and therefore the conclusion is not warranted by the premises. It is true, at the end of the indictment the truth of the pretences used is negatived ; but that will not supply the want of a direct allegation that the defendant knowingly used *false* pretences ; because it is not enough to bring a case within the statute, that the defendant made use of certain pretences, and that those pretences were false, unless he knew them to be false at the time. Falsity is as much the substance of this crime as of perjury ; now no indictment for perjury would be good without a direct allegation that the defendant *falsely* swore, although the falsehood of the fact sworn were afterwards positively alleged. So in forgery, all the precedents are that the instrument was *falsely* made. Besides, though the truth of each member of the pretence is separately negatived, it is no where stated that the whole combined together was false.

Holroyd, contra, was stopped by the Court.

LORD KENYON, C. J. The case is too clear to require any argument. I do not quarrel with any of the general propositions which have been advanced, such as, that the substance of the offence ought to be charged with certainty ; and that the law will not intend guilt unless it be positively alleged and proved ; and the like. But the question is, Whether there be not a positive charge of obtaining money upon false pretences in this case ? In certain cases, it is true, there must be known technical words used in order to describe particular offences, such as, *murdravit* in murder ; *burglariter* in burglary ; *rapuit* in rape. These having been long ago established to be necessary in the description of the several offences must be abided by. But there is no rule of law which says, that there must be technical words in every case ; nor am I inclined to multiply the instances. I once before had occasion to refer to the opinion of a most eminent judge, who was a great crown lawyer, upon this subject, I mean Lord *Hale*, 2 *Hale*, 193 ; who even in his time lamented the too great strictness which had been required in indictments, and which had grown to be a blemish and inconvenience in the law ; and observed, that more offenders escaped by the over easy ear given to exceptions in indictments, than by their own innocence. What is this case ? A man gives goods to a carrier to convey to a certain person at another place ; the carrier pretends that he delivered them, and that the bailee had given him a receipt for them, but that he had mislaid or left it at home ; by which he gets the price of the carriage from the other ; and all these pretences the indictment proceeds to charge were untrue : and yet it is objected, that it is not alleged with sufficient certainty that he obtained the money by false pretences. But unless there must be some particular arrangement of words in such an indictment, I cannot see how the matter can be rendered more certain. There would be just as much sense in requiring that the indictment should be written in the old *Saxon* character. Take the whole of the indictment together, and the charge appears plain and intelligible ; and if the defendant had not known the pretences to be false, it would have been matter of defence for him before the jury.

GROSE, J. I agree that the offence must be substantially alleged, and I think it is so in this indictment. It is alleged that the defendant received money upon certain pretences, and in a subsequent part of the indictment all those pretences are alleged to be false ; and it even goes on to state, that by means of such *false* pretences he obtained the money. That was not necessary in my opinion ; for it would have been sufficient to have shewn the pretences, and averred them to be false. And all through the indictment charges

the several pretences to have been made "unlawfully, knowingly, and designedly," for the purpose stated. The offence, therefore, is completely brought within the words and meaning of the statute.

LAWRENCE, J. Every indictment must contain all the circumstances necessary to constitute the crime; and those circumstances must be stated positively without any periphrasis, or intendment. Now here the crime in fact was, that the defendant obtained money from the prosecutor by pretending that he had delivered the goods according to his order; which in truth he had not done. Then does the indictment charge that offence? It alleges that the defendant pretended that he had delivered the goods, and had taken a receipt for the delivery, which receipt he pretended he had mislaid or left at home; and then the indictment avers every one of these pretences to be false; and that the defendant did all this unlawfully, knowingly, and designedly; which is all that the statute requires: and it is immaterial in what part of the indictment the several allegations are to be found.

LE BLANC, J. concurred in opinion; observing, that there was a positive allegation that the pretences made were false, which was all that the statute required in that respect to bring the case within it. Judgment affirmed.

Watson v. Mary Foxon.

2 East, 26. Nov 12, 1801.

Under a limitation (after estates for life to *A.* and *B.*) of "all and every the said premises to "all and every the younger children of *B.* begotten, or to be begotten, if more than one "equally to be divided amongst them, and to the heirs of their respective body and bodies "as tenants in common, &c. and if only one child, then to such only child and to the "heirs of his or her body issuing; and *for want of such issue*" (a devise of) "*the said premises to C. A. &c.*" (with several limitations over). "And for want of such issue," then the testator divided the said premises between several branches of his family. Held that cross remainders were to be implied between the younger children of *B.* from the apparent intention of the testator from the whole of the will, notwithstanding the use of the word *respective* in such devise.

IN *assumpsit* for money had and received by the defendant to the plaintiff's use, tried before Lord Kenyon, C. J. at Guildhall Sittings in Trinity term 1801, a verdict was found for the plaintiff for 161*l.*, subject to the opinion of this Court on the following case:

An action was brought by the plaintiff to recover 161*l.* paid by him to the defendant in advance on a contract entered into between them for the sale of certain messuages and lands at *Washingborough* in the county of *Lincoln*, and which he seeks to recover on the ground that the defendant cannot make a good title to the premises. The title is as follows:—*Thomas Becke* was seized in fee of the premises in question, and several other estates in *Lincolnshire*, on the 25th October, 1755. He had a son *John Becke*, and two daughters, *Ellen*, who had married *Gervase Gibson*, and *Sarah*, who had married *Charles Newcomen*. *John Becke* had two children, *Thomas Kellett Becke* and *Mary Becke*. *Ellen Gibson* had one daughter *Ellen*. *Sarah Newcomen* had one daughter, *Mary*, who married *John Foxon*; and had four children, *Thomas*, *Clarissa*, *Charles*, and *James*. All these persons were living when *Thomas Becke* made his will, and at the time of his death. On the 25th of October 1755, he made his will, duly executed and attested to pass real estates; and thereby, after providing for his grand-daughter *Mary Becke*, limited the principal part of his estate (not now in question) to his son *John Becke* for life, remainder to *Thomas K. Becke* for life, and so on in strict settlement to the children of *Thomas Kellett Becke*, with divers remainders over to his other children and grand-children; and also limited other premises (not now in question) to his daughter *Ellen Gibson* for life, remainder to his

grand-daughter *Ellen Gibson* in tail, with divers remainders over to his other children and grand-children. He devised the premises in question in the words following: "*Item*. I give and devise all that my farm, with all and every the messuages, cottages, closes, lands, and tenements to the same belonging, situate and being in *Washingborough* and *Heighington* in the county of *Lincoln*, as the same are now in the tenure of Mr. *Robert Hurton*, his assigns or under-tenants, together with my fishery there, to my daughter *Sarah Newcomen*, and to my grand-daughter *Mary Foxon*, during their respective lives, and the life of the longer liver of them, equally to be divided between them; remainder (to a trustee and his heirs to preserve contingent remainders). And from and after the deaths of the said *Sarah Newcomen* and *Mary Foxon*, and of the death of the survivor of them, I give and devise all and every the said premises to all and every the younger children of the said *Mary Foxon* begotten or to be begotten, if more than one equally to be divided amongst them, and to the heirs of their respective body and bodies, to hold as tenants in common, and not as joint-tenants; and if the said *Mary Foxon* shall have only one child, then to such only child and to the heirs of his or her body lawfully issuing; and for want of such issue, I give and devise the said premises to my son-in-law, Mr. *Charles Newcomen* for the term of his natural life; and from and after his decease I give and devise the same to my grandson-in-law, Mr. *John Foxon*, for the term of his natural life; and from and after his decease, I give and devise the said premises to my son *John Becke* for the term of his natural life; and from and after his decease, I give and devise the said premises to my grandson *Thomas Kellett Becke*, and to the heirs of his body to be begotten; and for want of such issue, I give and devise the said premises to my grand-daughter *Mary Becke*, and to the heirs of her body to be begotten; and for want of such issue, I give and devise the said premises to my daughter *Ellen Gibson* for the term of her natural life; and from and after her decease, I give and devise the same to my grand-daughter *Ellen Gibson*, and to the heirs of her body to be begotten; and for want of such issue, I give and devise the said premises to all and every the younger children of the said *Ellen Gibson* my daughter begotten or to be begotten, if more than one equally to be divided amongst them, and to the heirs of their respective body and bodies, to hold as tenants in common and not as joint-tenants; and if my said daughter *Gibson* shall have only one child, then to such only child and to the heirs of his or her body lawfully issuing; and for want of such issue, I give and devise two third parts of the said premises to my two nieces *Justina* and *Elizabeth Becke*, and the other third part of the premises to the three children of my niece *Sarah Searby*, and to the heirs of their respective bodies, to hold as tenants in common, and not as joint-tenants; and for want of such, to my own right heirs for ever." The testator has taken notice by name of all the four children of *Mary Foxon* in different parts of his will. The said *Thomas Becke* died seized in fee of all the said lands in 1758.

It is admitted, that the defendant can make a good title, and that the plaintiff is not entitled to recover if under the devise above set forth cross remainders are raised in the premises in question between the younger children of *Mary Foxon*: and that she cannot make a good title, and that the plaintiff is entitled to recover if such cross remainders cannot be raised. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover? If he were, the verdict to stand, otherwise a nonsuit to be entered.

This case was argued in *Trinity* term last, by *Hullock* for the plaintiff, and *Dampier* for the defendant; and again in this term, by *Gibbs* for the plaintiff, and *The Attorney General* was to have argued for the defendant, but the Court thought it unnecessary to hear him. The arguments ran to great length; but as the cases cited and commented upon have been so often discussed before on similar occasions, and as the Judges in delivering their opinions on

the present case went so fully into the subject, both upon general principles of law, and the particular application of them to the will in question, it is unnecessary to detail the arguments urged at the bar. The principal stress was laid by the plaintiff's counsel on the word *respective*, in the limitation to the younger children of *Mary Foxon* and the heirs of his and their *respective* body and bodies, &c. as disjoining the title and preventing the raising of cross remainders between such children : and the opinion of Lord *Hardwicke* in *Comber v. Hill*, 2 Stra. 969, and *Davenport v. Oldis*, 1 Atk. 579, thereupon.

Lord KENYON, C. J. Whether if the question were now to be taken up again *de novo*, the strict rules of construction applicable to deeds were not better to be required in the case of wills, I have always had my doubts. It is now, however, too late to consider that question ; for ever since the statute of wills enabled persons to dispose of their property in that manner, the endeavour has always been to give effect to the intention of the testator so far as it is to be collected from the instrument itself. And such being the rule of construction, it would be deluding parties to do otherwise ; after pretending to give them a power to dispose of their property according to their intention, not to give effect to it where it is capable of being ascertained and effectuated. I cannot do better than express my opinion in the words of Lord *Mansfield* in *Perry v. White*, Cowp. 780, that where cross remainders are to be raised by implication between two and no more, the presumption is in favor of cross remainders : where they are to be raised between more than two, the presumption is against them : but that presumption may be answered by circumstances of plain and manifest intention either way. Whatever is declaratory of the intention of the party, I take to be expressed. No technical words are necessary to convey an intention ; but if taking the whole instrument together there be no doubt of the party's meaning, we arrive at the conclusion. Now here the testator sets out with devising all that his farm, and all and every the messuages, &c. in] *W. and H.* to his daughter *S. N.* and his grand-daughter *Mary Foxon* for their lives, remainder after the death of the survivor to all and every the younger children of *Mary Foxon* ; if more than one, equally to be divided amongst them, and the heirs of their respective body and bodies as tenants in common ; and if only one child, then to such only child, and the heirs of his or her body, &c. " And for want of such issue, I give and devise *the said premises*" to my son-in-law *C. N.* (What he meant by *the said premises* is evident, and could not have been rendered clearer by saying *all the said premises* ; though it might have served to multiply the words.) Then after several limitations, " and for want of such issue," he proceeds to divide the estate into thirds to go to different persons ; till then the entirety of the estate was to be preserved, and all was to go over at the same time. But great stress is laid here on the word *respective* as disjoining the title ; and the authority of Lord *Hardwicke* is referred to in the cases mentioned, *Comber v. Hill*, 2 Stra. 969. *Davenport v. Oldis*, 1 Atk. 579. No person regards whatever fell from that great Judge with more reverence than I do : but it was unworthy of his great learning and ability to lay such stress as he is stated to have done on the word *respective*. Creating a tenancy in common divides the title as much, whether the word *respective* be used or not. And as to what may have been said by other Judges, with reference to the opinion delivered in *Comber v. Hill*, and *Davenport v. Oldis*, in subsequent cases where the word *respective* did not occur ; feeling themselves right in the principle on which they proceeded, it is not to be wondered at that they were desirous of relieving their own minds from the weight of Lord *Hardwicke's* opinion by shewing that there was a distinction between the cases in the omission of that word on which he had so much relied : but it is too much to infer from thence that those judges therefore approved of his opinion, or that their judgments were governed solely by that consideration. In deciding this question we are also bound to look to our own opinions delivered in other cases ; more especially when

those opinions have been revised and approved by higher tribunals. The case of *Atherton v. Pye*, 4 Term Rep. 710, was like the present; our opinions there were certified to the Lord Chancellor, and approved by him, and the estate went accordingly. There indeed the devise over, in default of such issue, was of *all* the testator's said lands; and stress was laid by some of us on the word *all* in support of raising cross remainders between the issue, I will not say by implication, but by what we collected to be the intention of the testator. But the word *all* was not decisive of that case, and in truth makes no difference in the sense; for a devise over of the said premises, or the premises, or all the said premises, means exactly the same thing. Admitting, therefore, the general rule, that the presumption is not in favour of raising cross remainders by implication between more than two, still that is upon the supposition that nothing appears to the contrary from the apparent intention of the testator. I have no doubt here but that the testator intended to give cross remainders amongst the issue of *M. F.* The devise over of the premises meant *all* the premises: he intended that all the estate should go over at the same time. I think Lord *Mansfield's* quarrel with the case of *Davenport v. Oldis* well founded; and I agree with the cases of *Wright v. Holford*, Cowp. 31, and *Phipard v. Mansfield*, Ib. 797; and I cannot distinguish this case from those. I am clearly of opinion that the intention of the testator is the Polar Star by which we should be guided in the construction of wills where no rule of law is thereby infringed: and here the intention is clear to give cross remainders.

GROSE, J. The old rule of construction was, that as amongst more than two, the presumption was against cross remainders by implication; but that being a presumption of intent, it would be most absurd to say that it should prevail against the apparent intention of the testator to the contrary: for that would be no other than saying that that which was to be governed by the testator's intent should be decided in direct opposition to it. (After adverting to the state of the testator's family at the time), the premises are devised amongst the younger children of *Mary Foxon*, his grand-daughter, and the heirs of their respective body or bodies, if more than one, as tenants in common, if only one child, then to such only child and the heirs of his or her body; and for want of *such issue*, then over. The question then is what the remainder-man was to take; in any event, whether there were one or more children, it is plain that he was to take the whole, for the devise to him is of *the said premises*, which must mean the whole, in default of *such issue*, that is in default whether of one or more. And this is rendered still more plain by the subsequent part of the will, where, after other intermediate limitations, the estate is to be divided in several portions, which shews that the testator meant that it should go over entire, till the event in which it was expressly directed to be divided. Then can we say, that it was not his intention that the children of *Mary Foxon* should take cross-remainders, without which the estate could not go over altogether to the person to whom it was next limited over. It is true, that the word *respective* occurs here in the limitation to the children of *Mary Foxon*, and the heirs of their respective bodies; and it is as true, that there is no case of cross-remainders where that word has been used in the same manner; but that is of no importance: there is no magic in the word; nor can it be said to be of any other consequence than to denote the intention of the testator; but if I find other words which more strongly denote a contrary intent, why should greater deference be paid to that word alone than to all the rest of the will: and as other parts of the will shew a plain intent to give cross-remainders, we cannot construe it otherwise without violating that intention.

LAWRENCE, J. The rule as laid down in *Gilbert v. Witty*, Cro. Jac. 666, is, that cross remainders shall not be implied between more than two; but in *Cole v. Livingston*, 1 Ventr. 224, Lord *Hale* admitted that they might be

implied between three, where the words very plainly express the intent of the deviser to be so. And in the more modern case of *Pery v. White*, Cowper, 790, Lord Mansfield lays down the rule thus; "Whenever cross remainders are to be raised by implication between two and no more, the presumption is in favour of them: when they are to be raised between more than two, there the presumption is against cross-remainders: but that presumption may be answered by circumstances of plain manifest intention either "way." This is a qualification of the rule laid down in former cases; for they seem to say, that there shall not be cross-remainders between more than two. Lord Hardwicke's authority leans a good deal that way, and so do the cases of *Comber v. Hill*, 2 Stra. 969, and *Williams v. Brown*, 1b. 996, and some others. But the true rule is, as I take it, with the qualification I have stated. In the case now before the Court, cross-remainders are to be raised between more than two, and it is to be seen if there be not circumstances to destroy the presumption against implying them; and it seems to me that there are. At the time that the testator made his will there were four persons *in esse* who fell within the description of children of *Mary Foxon*: there might be more, or they might be reduced to one, or all might die. To these circumstances he was attentive; for he speaks of the children begotten and to be begotten, and adverts to the possibility of there being one only to be the object of his bounty: and he gives his estate in such way as to shew his intention to be, that the children of *Mary Foxon*, however large or small their number might be, should take the whole of the estate; and that he was not influenced by any consideration of their being many or few, or by any preference to those *in esse*; but that he meant it should be enjoyed by the issue of *Mary Foxon*, whatever their number might be. And if that be so, it would be putting a construction on the will contrary to his intention, not to give cross-remainders; for if other children had come *in esse* and died without issue, it would have made the situation of the survivors worse than the testator intended it should be if the number of children had not been increased, without that reason subsisting which alone was meant by the testator to have that effect; and an advantage would be given to those in remainder by an after born child divesting so much of the estate as was intended solely for his benefit, and not for the remainder-man. He never could intend that the three children, who were born, should have the whole estate, if no others were born; and that if three others were born, and had died immediately on their birth, that the three eldest and their issue should lose half of the estate. I think further, that the presumption against cross-remainders may be answered from the circumstance of the devise over of two third parts of the said estate to *Justina* and *Elizabeth Becke*, and of the other third part to the children of *Sarah Searby*. It is a limitation of the *said premises*: now the *said premises* are the whole of what was before devised. And it seems to me improbable, that the testator could have meant, that his two nieces and the children of a third niece should take otherwise than the whole together, from the very inconsiderable part of the estate which might come to be divided, if they were to take, as the different persons to whom the earlier limitations were made died without issue. For if cross-remainders are not implied, and one of *Mary Foxon's* three younger children had died without issue, and the share of that child, by the failure of intermediate limitations, had gone to the younger children of his daughter *Ellen Gibson*, and she had had a like number of younger children, and one of them had died without issue, there would have been in that case the third of a third or one ninth part to be divided between the two nieces and the children of the other niece; so that all the children of *Sarah Searby* would have taken one 27th part; and if instead of three younger children, there had been six, they would have had only one 108th part. In many cases the presumption against cross-remainders has been controlled by circumstances not to my mind stronger. In *Wright v. Holford*, Cowp. 31, the words

"in default of such issue" were holden sufficient; there being no words to narrow their effect. In *Phipard v. Mansfield*, 1b. 797, the Court collected an intention to give cross-remainders from a clause by which the testator gave his personal estate equally to his devisees, and from thence inferred that he intended them equal benefit in his real estate. In *Atherton v. Pye*, 4 Term Rep. 710, cross-remainders were implied from its being collected that it was the intention of the testator that the whole of the estate should go over together, from his directing that in default of issue, *all* the premises should go to his right heirs; and yet that was but tautology, for *the premises* and *all the premises* are the same thing. In *Doe v. Burville*(a), where the testator, after giving to his three

(a) The following note of this case is taken from the MS. of Mr. Justice Ashurst, compared with another note taken by Mr. Justice Buller, when at the bar:

DOE on the demise of BURDEN v. BURVILLE. E. 13 Geo. 3, B. R.

A devise by A. (having 3 sons and 7 daughters) to his sons in succession for life, remainder to the heirs male of their bodies, remainder to the heirs female of their bodies, remainder to all and every his daughter and daughters (if two or more) as tenants in common, and to the heirs of her and their bodies, remainder to the heirs of the deviser's brother; gives cross remainders to the daughters. Between more than two the presumption is against cross remainders; but this may be controlled by a plain intention to the contrary.

IN ejementment the following case was reserved for the opinion of this Court:

George Charlton, by his will, dated 30th June 1707, devised unto trustees and their heirs his dwelling-house and lands thereunto belonging, with the appurtenances, upon trust for the use of his wife *Elizabeth* for life; and after her decease to the use of his son *James* for life, without impeachment of waste; and after his decease to the use of the heirs male of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to the use of his son *John* for life, without impeachment of waste; and after his decease to the use of the heirs male of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to the use of his son *George* for life, without impeachment of waste; and after his decease to the use of the heirs male of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to the use of all and every his (the testator's) daughter and daughters as tenants in common (if two or more) and not as joint-tenants, and to the heirs of her and their body and bodies issuing with remainder to the heirs of his brother *Abraham* for ever. And he also devised to the same trustees and their heirs another estate in *Headcorne* upon trust for the use of his said wife for her natural life, without impeachment of waste, charged and chargeable with the payment of one annuity or yearly rent charge of 30l. tax free to his son *John*, payable half yearly during his life. And from and after the decease of his said wife upon further trust to permit his said son *John* to receive the rents and profits for his life, without impeachment of waste; and after his decease to the use of the heirs male of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to the use of his son *James* for life, without impeachment of waste; and after his decease to the use of the heirs male of his body issuing; and for default of such issue to the use of the heirs female of his body issuing; and for default of such issue to the use of all and every his daughter and daughters as tenants in common (if two or more) and not as joint-tenants, and to the heirs of her and their body and bodies issuing, with remainder to the heirs of his brother *Abraham* forever. All the sons are dead without issue. All the daughters, who were seven in number, surviving the father, died in the lifetime of the surviving son *John*. The question was, Whether by this will there were cross remainders raised between the daughters? If there were, the verdict to stand for a moiety of all the premises devised to *James* and *John*. If not, then a nonsuit to be entered.

After argument by *Cox* for the plaintiff, and *Wallace*, contra;

Lord Mansfield, C. J. delivered the opinion of the Court.—The question is, Whether there are cross remainders between the daughters? A limitation of cross remainders might without doubt have been made in express words: The question then is, Whether the testator has used such words as to shew his meaning that there should be cross remainders? No technical words are necessary in a will; if the testator's meaning sufficiently appear, it ought to be carried into effect. The argument at the bar turned not upon the intention, but upon the rule of construction which has been echoed from the case of *Gilbert v. Willy* down to the present time, that there shall not be cross remainders by implication between more than two. The reason given for it, namely, to avoid the splitting of tenures, could only be used as an ar-

sons estates in tail general, with cross-remainders in default of their issue, limited the estate to all and every the testator's daughter and daughters, as tenants in common, if two or more, and not as joint tenants, and as to the heirs of her and their bodies issuing, remainder to the heirs of his brother. Lord Mansfield relied on the use of the word *remainder* being in the singular number, and on the necessity of all the daughters of each of the testator's sons dying without issue before the remainder to the other sons would take place, as circumstances to shew that cross-remainders were intended between his own daughters. The counsel for the plaintiff have most relied on the deviser having given the estate to the heirs of the *respective* bodies of the children, as a circumstance to shew that cross-remainders were not intended; and have cited the cases of *Comber v. Hill*, *Davenport v. Oldis*, and *Brown v. Williams*. As in those cases the limitations are not in the same words with the limitation in this case, I do not feel myself pressed by them: there is no principle extracted from them which I mean to controvert. And where a case is cited not for the sake of some principle or rule, but to shew that certain expressions cannot or must have this or that construction put on them, such cases can only rule other cases where the subject matter of construction is not to be distinguished. The word *respectively* has no uncontrollable force to prevent cross-remainders: the intention of the testator may be collected from that word to shew that he did not mean cross-remainders, but that inference may be restrained by other words; according to what was said in *Doe v. Dorrell*, 8 Term Rep. 518. In this case I understand the word *issue* to mean "all and every the younger children of

gument against the testator's intent. This rule has been so often repeated, that, though not solemnly adjoined in any case which turned on that point, yet it has been so often recognized that it ought not to be shaken. But the true sense of the rule is, that between two the presumption is in favour of cross remainders; between more than two the presumption is against them: but in either case the intention of the testator may control the presumption. In *Comber v. Hill*, and *Williams v. Brown*, though between two only, the word *respective* controlled the construction of cross remainders. In *Cole v. Livingston*, Ventr. 224, and the case in Dy. 303, though between more than two, yet it was holden there should be cross remainders from the plain intention of the parties. The case in Dyer, which was, where A. had five sons to whom he devised, was determined upon the words, *if they all die*. *Cole v. Livingston* has adjudged *Gilbert v. Witty* to be good law; for the judges said, there shall not be cross remainders between more than two, unless the words plainly express the intent. In *Marryat v. Townly*, 1 Ves. 102, Lord Hardwicke says the law will not admit of cross remainders between more than two; but that is by implication only; but where the intention is plain, it is otherwise: and there he held the word *joint-tenants* to explain it. In *Miller v. Moore*, 13 Geo. 2, Lord C. J. Lee said, "where the devise is to three or more, cross remainders cannot be held, unless the intent be plain and unavoidable; and then the court may be forced to determine it to be cross remainders." The question then is, under these authorities, Whether the intent here is so plain and unavoidable as that it cannot be effectuated without giving cross remainders? and we think that it is plain and unavoidable to give cross remainders. The testator had three sons, to each of whom he gives several estates in tail. His plan was to follow the course of descent, by preferring even the female line of each of his sons (in failure of the male) before his other sons and their male line, and before his own daughters. He thought the coming to his daughters a remote contingency; he therefore makes use of the words "daughter and daughters; all and every; if two or more;" supposing that the number might be reduced before they might become entitled. He takes for granted that a remainder to his brother Abraham, who was alive when he made the will, could not take place till failure of his own issue; therefore he limits the remainder to the *heirs* of his brother Abraham, supposing it not likely to happen in his time. He also limits the remainder in the singular number; conceiving that it could not take effect till the death of the last daughter without issue. We think these words are equivalent to an express declaration that there shall be cross remainders. In all the limitations the female line of each son must fail, before the male line of the other sons shall take, and all must fail before the daughters could take: then it would be absurd so suppose that he meant to devise over the shares of any of his own daughters dying from the rest, when he had not done so by his son's daughters; or that he should have given to the heirs of his brother the share of one of his own daughters dying while any of them were left; for if Abraham had no children, then the daughters would be his heirs. Therefore, we think he has given all his daughters the estate with cross remainders as fully as if he had given them in the most express words. Consequently, the verdict must be entered for a moiety of the premises devised to James and John.

"*Mary Foxon*, begotten or to be begotten, and the heirs of their respective "body and bodies;" and as long as any of her children or the heirs of their bodies are *in esse*, there is not a want of such issue. It is true, that in *Comber v. Hill*, and in *Davenport v. Oldis*, Lord *Hardwicke*, in the construction he put on the wills in those cases referred the word *respective* to the heirs of the bodies: but there it could not be referred to the first takers of any estate of inheritance, because the limitations were to certain persons by name, and not to persons falling under the general description of children begotten or to be begotten, to whom *issue* will fairly apply in this case. The case which is nearest the present is that of *Williams v. Brown*, 2 Barnard. 231, and 2 Stra. 996, in which, according to the account of it in Barnardiston, the Court did not decide against cross-remainders but with great difficulty. But in that case the limitation was materially different; for that was a limitation to all and every the child and children born or to be born of the body of *Mehetabel*, equally to be divided between them and the heirs of their respective bodies; and for want of such *heirs*, remainder over. Now the word *heirs* was not applicable to the words "child and children," but was according to all rules of construction necessarily referable to the same word which just preceded it. There was not a limitation over, like the one I have pointed out, to the nieces after other intervening limitations; which limitation is rational enough, if cross-remainders are implied from the certain defined benefit the two nieces and children of the third would in such case take; but, as it seems to me, if cross-remainders are not implied, the benefit is too uncertain, and in events not improbable, too inconsiderable ever to have been intended by the testator.

LE BLANC, J. This is a question of intention, which is to be collected from the words of the will according to the rule which has been established in this respect; which rule I take to be, that if cross-remainders are to be implied between two only, the presumption is in favour of raising cross-remainders, unless the Court see any thing in the will which shews that the testator meant otherwise. But if cross-remainders are to be implied between more than two, then the Court must look to the will to see if there be any words from whence such an intent is to be collected, in order to rebut the presumption of a contrary intent. Here the testator devises to the younger children of *M. F.* and the heirs of their *respective* body and bodies, to hold as tenants in common, &c. and the word *respective* is relied on as shewing an intention to sever the title, and against cross-remainders. But where would have been the difference if he had omitted the word *respective*? It has no effect beyond giving an estate in severalty to each of the younger children and their heirs, as tenants in common, which would equally have been effected by the tenancy in common without the use of the word *respective*. Therefore, unless the use of that word shew a different intent in the testator, I cannot distinguish this case from any other where it was omitted in a devise of the same kind. The Court, however, have been pressed with former decisions where stress was laid upon that word, as in *Davenport v. Oldis*, and *Comber v. Hill*; and with subsequent cases in which the former were recognized. Of the latter it is sufficient to observe, that the Judges went expressly upon the apparent intent of the testator; and it was a ready answer to give to the former decisions, that they were distinguishable from the cases then before them in having the word *respective*. But all the later decisions establish the principle, that cross-remainders may be raised by implication even between more than two, where the intent is clear to that purpose. Now I collect such an intent in the present case from the limitation to *all and every* the younger children, and the heirs of their bodies, if more than one, as tenants in common; if *only one*, to such *only* child, and the heirs of his or her body, and in default of such issue then over: and in the subsequent part, where he foresees the possibility of all the children dying without issue, the testator divides the estate amongst different branches of his family; which shews that till that period

he intended that it should go over entire. Therefore, without breaking into any rule of law, I think the intention so plain as to rebut the presumption against cross remainders; and where such an intent is apparent, the rule of law is to raise cross-remainders.

Postea to the Defendant(a)(1).

The King v. The Inhabitants of Ferry Frystone, otherwise Ferrybridge.

2 East 54. Nov. 14, 1801.

Neither the bearing of a pauper who is dead, nor his ex parte examination in writing taken on oath before two magistrates, touching his settlement, are admissible evidence of such settlement.

TWO justices by an order removed *Catherine Hill*, the wife of *John Hill* deceased, and her four children by name, from the township of *Leeds* to the township of *Ferry Frystone*, both in the West Riding of the county of *York*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on a case stating; that upon hearing of the appeal the respondents in support of the order of removal produced the pauper *Catherine Hill* as a witness; who deposed, "that she was the widow of *John Hill*, and that she had heard the said *J. Hill* in his lifetime say, that his settlement was at *Ferrybridge*, which he said he gained by hiring with and serving one *J. Hawkshead*, a bricklayer in *Ferrybridge*, for a year." The respondents then gave in evidence the examination, of which the following is a copy: "East Riding of the county of *York*.—The examination of *John Hill*, late in the royal artillery, now residing at *Kilnwick* in the said Riding, taken upon oath this 15th day of *April*, 1788; who saith, that his legal settlement is at *Ferrybridge*; that he acquired the same by servitude, namely, by being hired for one whole year, and serving the said year with *J. H.* bricklayer of *Ferrybridge*; and that he hath not gained any legal settlement elsewhere since to the best of his knowledge and belief." (Signed and attested.) No proceedings were had in consequence of this examination until the order of removal, which is the subject of this appeal, was applied for and made. The respondents did not offer any other evidence than what is above stated in support of the order of removal; upon which the counsel for the appellants objected both to the admissibility of the testimony of the said *Catherine Hill* so given by her as aforesaid, and also of the said examination in evidence. The Sessions, however, thinking the evidence above stated to be sufficient proof of the pauper's settlement in *Ferrybridge*, confirmed the order, subject to the opinion of this court. It was afterwards certified, that *Ferry Frystone* and *Ferrybridge* are one and the same township.

Topping and *Heywood*, in support of the order of Sessions, (after an ineffectual application to have the case sent down to be re-heard by the Sessions,) said, that they could not add any thing to the argument of *Mr. Justice Buller* in the case of *The King v. Eriswell*, 3 Term Rep. 707. 712, in support of the admissibility of the evidence.

Christian, contra, was stopped by the Court.

Lord KENYON, C. J. The point upon which the Court were divided in opinion, in the case of *The King v. Eriswell*, has been since considered to be

(a) Vide cases on cross remainders collected in *Mr. Serjeant Williams' note on Cook v. Gerard*, 1 Saund. 185. To which may be added *Doe v. Cooper*, 1 East's Rep. 229, and *Doe v. Worsley*, ib. 416. [Also *Roe d. Wren & al. v. Clayton*, 6 East 628. *Doe d. Gorges & al v. Webb*, 1 Taun. 234.]

(1) [See note to 1 East 416. *Doe v. Worsley*.—W.]

so clear against the admissibility of the evidence either as to the hearsay of the pauper or his examination in writing, that it was abandoned by the counsel at the bar in the case of *The King v. Nuneham Courtney*, 1 East's Rep. 373, without argument. It is true, there was no evidence there that the pauper, whose examination had been admitted in evidence, was dead: but our opinion against the general doctrine laid down by the two Judges who supported the reception of the evidence in the former case was pretty broadly hinted. And to be sure, that point may now be considered to be at rest.

Per Curiam,

Both orders quashed(a).

Davidson v. Mo Scrop.

2 East, 56. Nov. 17, 1801.

The custom to swear the jurors at one court leet to inquire, and return their presentments at the next court, is bad in law.

IN replevin the defendant made cognizance as bailiff of Sir *James Graham*, Bart. and justified, 1st, That the *locus in quo* from time immemorial has been within, and part and parcel of, the manor of *Nichol Forest*, in the county of *Cumberland*, of which Sir *James* was seised in his demesne as of fee: and that from time immemorial the lords of the manor have been used and accustomed to hold a court leet and view of frankpledge within the manor twice a year, &c. of all the inhabitants and resiants within the manor before the steward, &c. That the plaintiff, before and at the time of holding the court after-mentioned, and from thence continually and at the time when, &c. was, and from thence continually hitherto, has been, and still is, an inhabitant and resiant within the manor, and subject to the jurisdiction of the said court: and that before the said time when, &c. and whilst Sir *James* was so seised, &c. and whilst the plaintiff so was an inhabitant and resiant, &c. and before the holding of the said court aftermentioned, viz. on 28th September 1800, due notice was given to the inhabitants and resiants within the manor to appear at the then next court leet, &c. within one month after *Michaelmas*, &c. viz. on 1st October 1800, to do suit and service there: that on the said 1st of October, a court leet and view of frankpledge was in due manner and form holden in and for the manor before the steward, according to the custom, &c. at which court the plaintiff, so being such inhabitant and resiant as aforesaid, though called, did not appear, but made default; whereupon the plaintiff was then and there by the said steward in the said court fined 40s. for his said default, whereof he had due notice, &c. but though demanded, has refused to pay the said 40s., wherefore the defendant distrained, &c. The second cognizance stated in like manner, that Sir *James Graham* was seised of the manor, and had a prescriptive right to hold a court leet and view of the frankpledge twice a year, within a month after *Easter* and *Michaelmas*, of all the inhabitants and resiants within the manor, before the steward, &c. And it further stated an immemorial custom within the manor, that the jurors sworn in every court leet and view of frankpledge so holden, &c. have been and ought to be charged and sworn in the said court to inquire into and present those things which to the said court belong, &c. and to return such their presentment at the then next court to be holden, &c. and in default of their so doing, the steward of the said next court has, during all the time aforesaid, been used and accustomed, and of right ought to set a certain reasonable fine upon every such juror making such default for the use of the lord, &c. and then set forth another immemorial custom to *distrain* for such fine.

(a) Vide *Rez v. Chadderton*, ante, 27, and *Rez v. Abergwilly*, post. 63. [Also *Rez v. Erih*, 3 East, 539.]

It then averred, that the plaintiff, before and at the time of holding the court after-mentioned, and from thence continually, and at the said time when, &c. was and still is an inhabitant and resiant within the manor, and subject to the jurisdiction of the said court; and that whilst he was such inhabitant, and resiant, viz. on the 16th April 1800, (within a month after *Easter*), a court leet and view of frankpledge of the inhabitants and resiants within the manor was holden in and for the same, before the steward, according to the custom, &c. at which said court the plaintiff, so being such inhabitant and resiant, appeared, &c. and was then and there, with the rest of the jurors present, duly sworn and charged to inquire into and present, &c. and to return such presentments at the court then next to be holden in and for the manor, &c. That afterwards, viz. on 28th September 1800, due notice was given to the inhabitants and resiant, &c. to appear at the then court leet, &c. within a month after *Michaelmas*, &c. viz. on 1st October 1800, and that on the said 1st October, the said court was holden before the steward, &c. being the next court, &c. after the plaintiff was so sworn and charged as aforesaid; at which said last mentioned court the said plaintiff so being such inhabitant and resiant as aforesaid, and having been so sworn and charged as aforesaid, though called, *did not appear to return any presentments or to do suit and service there*, but therein made default; whereupon he was then and there by the said steward, in the said court, according to the said custom, fined 40s. for the use of the lord, &c. for his said default; (the said fine then and there being a reasonable fine on the said occasion) whereof the plaintiff had notice; but though required, has refused to pay the same, &c. wherefore the defendant, as bailiff, &c. distrained, &c.

To this the plaintiff demurred, and assigned for special cause as to the first cognizance, that it does not therein appear that the said fine of 40s. was a reasonable fine on that occasion. And as to the second cognizance, that it is not alleged that any of the rest of the jurors, who, beside the plaintiff, are alleged to have been sworn and charged at the court therein first-mentioned to have been holden, were resiants or inhabitants within the manor at the time of holding the court therein lastly-mentioned; so as that it might appear that there were a proper or sufficient number of the jurors who were sworn at the said first court, resiant and inhabitant within the manor, to make any presentments at the last-mentioned court, &c., and also, for that it does not appear by the said cognizance that any presentments were in fact omitted at the last-mentioned court, &c. or that there was any default in any presentments being made at said court. And also the general causes of demurrer were assigned.

Littledale, who argued in support of the demurrer, did not touch upon the special causes assigned against the second cognizance, but objected as to the first cognizance, that the steward of a court leet has no authority to impose a fine for the non-attendance of a suitor: but according to *Hall v. Turbett*, Cro. Eliz. 241, there ought first to have been a presentment. And by the same case, the party should rather be amerced than fined; for if the fine be too grievous he has no remedy; but for amerciaments a *moderata misericordia* lieth. And the distinction is taken in *Grisley's* case, 8 Co. 38 b. and Sav. 93, that as to contempts and disturbances in the court, as by refusal to be sworn, it being a court of record, the steward as judge may set a reasonable fine; but for acts or offences out of court, the party ought to be presented and amerced by the jury. Bro. tit. *Leete*, &c. pl. 29. 1 Roll. Abr. 219. & Dy. 211. b., also notice the like cases in which the steward may fine: and the doctrine laid down in *Godfrey's* case, 11 Co. 42. 44, and 1 Roll. R. 73, is to the same purpose: where it is also said, that the fine must be reasonable; (which is confirmed by 4 Inst. 261,) and if unreasonable, it may be avoided by plea. Wherefore it seems that it ought to have been averred here to be a reasonable fine, that issue might have been taken on it. [*Lawrence, J.* There are precedents of pleading in Co. Entr. 571, 572, where there is no averment of the reasonable-

ness of the fine : and in *Godfrey's* case it is said, that the justices are to judge of the reasonableness of the fine.] Perhaps it might be good on general demurrer. As to the second cognizance, there are three objections ; 1. It goes to compel every person who attended at one court to attend at the subsequent court, and so on at the succeeding courts, whether or not they continue resiants within the manor. 2. It is a custom against the policy of the law, and the due administration of justice, that the jury should be charged at one court leet, and make their presentments at another. 3. It is void as empowering the steward to impose a *fine* for non-attendance at the subsequent court, when by law he can have no such authority. 1. None but resiants are required to attend courts leet ; and at common law none are to attend for lands holden within the manor : because it is a personal service, and not by reason of tenure. Dalt. Off. of Sheriff, 387. 2 Hawk. Ch. 10. s. 2. 12. 2 Inst. 99. 122. Fitz. N. B. 160, 4to Edit, 373. Besides a custom to compel persons not resiants to attend is unreasonable, because it either has the effect of obliging them to continual residence, or it subjects them to great inconvenience and expense in coming from a distance. And this attendance would be without intermission after it once commenced ; for at each court the same persons would be sworn to attend at the ensuing court. The unreasonableness of such a custom is still more apparent if, as is said in 1 Rol. Abr. 542, the steward may, in case of a deficiency of resiants, compel a sojourner, or even a stranger accidentally passing by, to be sworn of the jury. 2. It is contrary to the rule and practice of all courts in the realm, that jurors should be sworn at one court to attend and make their presentments at another ; but they ought to inquire immediately after they are sworn. If it were otherwise, it would expose the jurors to be tampered with or influenced, and to engage in corrupt practices, detrimental to the general administration of justice. It is in direct contravention to the statute of *Westminster* 2. (13 Ed. 1.) c. 13, (a) which directs all indictments, &c. to be by twelve jurors at least ; whereas, if the indictments were not to be found till the next court after the jury were sworn, there may not be twelve left to make them. The court is comprised of the steward and jurors, the latter of whom being a fluctuating body, as soon as the court ends the jurors are necessarily *functi officio*. This then being laid as a custom not merely to adjourn the same court from day to day, but to adjourn from one court to another, tends to perpetuate the jury, and render them a permanent body at the will of the steward. In the *Duke of Bedford v. Alcock*, 1 Wils. 248, a custom stated for aleconners sworn at one court to examine the weight of bakers' bread, and present offenders at the next, was objected to ; but the case went off on another point. The same point was doubted in *Moore v. Wicker*, Andr. 47, *Probyn* and *Chapple*, Js. thought that the jurisdiction of a leet jury, like that of a grand jury, was confined to things happening before their swearing, or during their sitting. 3. The steward having no power by general law to impose a fine for any offence committed out of court, a custom to enable him to do that which the law denies him on account of the grievance to the subject, is void. The lord of the leet can only claim by grant or prescription, which supposes a grant ; and the king can only grant such powers as are permitted by the law in that respect. As the king could not grant such a power of imposing fines to the sheriff for the public use, *a fortiori*, he could not make such a grant to and for his private use. This is not a custom arising out of the tenure of lands to which arbitrary conditions may be annexed at the will of the grantor, but is claimed in respect of mere resiancy.

Wood, contra, as to the first cognizance, admitted that the case of *Hall v. Turbett*, Cro. Eliz. 241, if law, was decisive against it : but observed that the distinction taken there did not apply to the case : for when the juror is

(a) This statute extends only to such offences for which the party may be imprisoned. *Colbrook v. Elliott*, 8 Barr. 1861.

called in court and does not appear, that is a fact which passes in the steward's presence in court, and therefore seems rather to fall within that class of cases where he may impose a fine, inasmuch as he does not require to be informed of any fact by the jury. Here the party is stated to have been a resiant during the whole time, and therefore the arguments which have been urged against the reasonableness of the custom with regard to non-resiants do not apply. The reasonableness of the fine is not cognizable by the jury, but by the court, according to the authority of *Godfrey's* case, before referred to. If it be unreasonable, the steward is subject to a criminal prosecution; but that question cannot be tried collaterally in a civil action. At any rate, however, there is no objection on that score to the second cognizance, where the fine is averred to be reasonable. The general objection does indeed apply also to the second cognizance. There is no case in point which determines that a custom to swear jurors at one court to make presentments at the next is bad in law: the practice is not unfrequent to do so: and it is reasonable, inasmuch as it gives the jury more time for deliberation.

Lord KENYON; C. J. I never heard of such a practice prevailing. The case of the *Duke of Bedford v. Alcock*, where something of the kind was stated, went off on the count for the *mutuatus*, which got rid of the question. The convenience of the thing is much the other way. It would open a door to great abuses. Besides, as far as these courts are of any use at the present day, it is to return small offences, such as require immediate attention and redress. And if grand juries inquiring for a whole country are presumed to be, and prove themselves competent to make their presentments at the same courts at which they are sworn, there seems no reason why a jurisdiction of so much less moment should require longer time for deliberation. Upon the whole, I see no colour for supporting such a custom.

Per Curiam,

Judgment for the Plaintiff.

The King v. The Inhabitants of Abergwilly.

2 East, 63. Nov. 18, 1801.

An *ex parte* examination in writing of a pauper touching his settlement cannot be received in evidence of such settlement, though he be dead.

TWO Justices by an order removed *Ann*, the widow of *Benjamin Jones*, deceased, and her children by name, from the borough of *Newport*, in the county of *Monmouth* to the parish of *Abergwilly*, in the county of *Carmarthen*. The sessions, on appeal confirmed the order, subject to the opinion of this court on a case; setting forth, in the first place, the examination of *Ann Jones*, taken before two magistrates, upon which the order of removal was founded; in which examination it was stated, "that her husband informed her after their marriage, that his last legal settlement was then in the parish of *Abergwilly*, "by hiring and service by the year to one *J. H.* there." (which was the only matter touching the settlement in *Abergwilly*.) The case then stated, that upon the trial of the appeal, the pauper, *Ann Jones*, upon her examination in court, denied having ever heard her husband say where he was a parishioner; upon which the court resorted to a written examination of the husband's, taken before two magistrates, soon after his marriage, but which, in the opinion of the court, was never acted upon in any manner until the hearing of the appeal. In that examination (which was set forth *verbatim* in the case) the husband swore to a settlement in *Abergwilly*, by hiring for a year, and service there for a much longer period, with *J. H.*; and that he had done no other act to gain a settlement elsewhere. It was contended on the part of the appellants, that the court ought not to have resorted to the examination either of the husband, who was dead, or of the pauper herself.

Abbott, who was to have argued in support of the order of sessions, admitted that it could not be supported after the recent determination of the court(a) against the admissibility of that species of evidence upon which the court had formerly been divided in opinion in the case of *The King v. Eriswell*: 3 Term Rep. 707, and against the reception of which evidence the present judges of the court had intimated a strong opinion in *R. v. Nuneham Courtney*(b).

The Court assenting, the rule was made absolute for quashing both orders(1).

Gibbs and *Milles* in support of the rule.

The King v. The Inhabitants of Wantage.

2 East, 63. Nov. 18, 1801.

A curate officiating in a parish for above a year, under the bishop's licence to perform the office of curate, at a certain annual stipend, is yet not such an annual officer as is entitled to a settlement by virtue of the stat. 3 W. 3. c. 11. s. 6.

TWO justices, by an order, removed *Robert Puzey*, clerk, from the township of *Wantage* to the parish of *East Lockinge*, both in the county of *Berks*.

On appeal to the sessions, a case was reserved, stating, that in the year 1784, *R. Puzey*, clerk, was nominated by the then rector of the parish and parish church of *East Lockinge* to be curate of the same, and was licensed to perform the office(c) of curate in the said parish and parish church by the then bishop of the diocese, who assigned to him the yearly stipend of 45l.(d).

That the pauper entered on the said curacy in the same year, and performed the duties thereof for six years, during which time he resided in the parsonage house within the said parish, and that he gained no subsequent settlement. The sessions were of opinion that this was no service of an annual public office or charge under the act, and quashed the order of removal subject to the opinion of this court on the above case.

When the case was called on, Lord *Kenyon*, C. J. said, that it was impossible to argue against the conclusion which the sessions had drawn. There was no pretence to say, that this was an office within the meaning of the act of King *William*, 3 W. 3. c. 11. s. 6, the executing of which for a year would give a settlement. That statute was evidently intended to be confined to inferior annual officers, such as constables and the like, known to the parish; and though in some instances the construction had been carried further, yet he was not inclined to extend it to cases still further from the contemplation of the legislature.

Gibbs and *Saxton* in support of the order of sessions.

Const, contra, referred to *Helsington v. Over*, Burr. S. C. 746, where though the settlement was denied, yet the court did not appear to proceed so much on the ground that the curate himself would not have been considered as an annual officer within the parish, as that the sequestrator, whose settlement was in question, was merely a deputy, whose function might be determined at any time.

Per Curiam,

Order of Sessions confirmed.

(a) In *R. v. Ferry Frystone*, ante, 54.

(b) Ante, 1 vol. 372.

(1) Vide *The King v. The Inhabitants of Erith*, 3 East 539.

(c) The bishop's licence, which accompanied the case, authorises the party during pleasure "to perform the office of curate in the parish, &c. in reading the Common Prayer and "performing other ecclesiastical duties belonging to the said office according to the form prescribed in the book of Common Prayer," &c.

(d) This is by virtue of the stat. 12 Ann. st. 2, c. 12.

The King v. The Inhabitants of Moor Critchell.

2 East, 66. Nov. 18, 1801.

Where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; and it is not enough to describe themselves justices of the peace in and for the *said connty*, although the proper county were named in the margin, and were also named last before such description of the justices.

TWO justices, by an order, removed *D. Spearing*, his wife and children, from the parish of *Donhead St. Mary*, in the county of *Wilts* to the parish of *Moor Critchell*, in the county of *Dorset*. The sessions, on appeal, confirmed the order. But both orders being removed by *certiorari* into this court, a rule was obtained, calling on the parish officers of *Donhead St. Mary* to shew cause why they should not be quashed for a default of jurisdiction in the magistrates making the original order apparent upon the face of it, in not stating them to be justices of the peace of the county of *Wilts*. The order was in this form: "*Wilts*, to wit.—To the churchwardens and overseers of the poor of the parish of *Donhead St. Mary*, in the county of *Wilts*, aforesaid, to remove and convey, and to the churchwardens and overseers of the poor of the parish of *Moor Critchell*, in the county of *Dorset*, to receive; these.—Whereas, complaint hath been made by you, the churchwardens, &c. of *Donhead St. Mary*, in the county of *Wilts*, aforesaid, unto us whose hands and seals are hereunto subscribed and set, being two of his Majesty's justices of the peace, in and for the said county, (one whereof is of the *quorum*,) that *D. Spearing*, &c. are come to inhabit, &c. (pursuing the usual form of such orders)."

Borough and *Casberd* now shewed cause, and contended, 1st, that the words—"justices of the peace in and for the said county," must have reference to the county in the margin, which is *Wilts*: 2dly, That it has reference in grammatical construction to the last antecedent county mentioned, which is also *Wilts*. And further, That from the whole scope of the order, it appears that it could only have been made by magistrates of *Wilts*, and not of *Dorset*. But,

The Court were clearly of opinion, that the objection was fatal(a). It ought expressly to appear that the justices had jurisdiction to make the order, and therefore there having been two counties mentioned before, they ought to have stated of which county they were justices. But Lord *Kenyon*, C. J. added his regret that the objection had been taken, as the decision would conclude nothing; for the court would direct a special entry to be made, in order to denote that the orders were quashed for want of form. And that it was to be lamented that the stat. 5th Geo. 2. c. 19, which was intended to give the justices in sessions a power of amending orders of removal which were defective in point of form, had, by the construction which had been put upon it, been rendered a dead letter, as all defects of this sort had been considered to be matters of substance, and not of form.

Gibbs and *Dampier* were to have argued in support of the rule.

Rule absolute.

(a) Vide *R. v. Stepney*, Burr. S. C. 23, and *R. v. Chilverscoton*, 8 Term Rep. 178.

The King v. The Inhabitants of Weobley.

2 East, 68. Nov. 21, 1801.

An exciseman who was rated for his salary, which was in fact paid by the collector without any deduction from the salary, does not thereby give a settlement.

TWO justices by an order removed *H. Williams, Elizabeth* his wife, and their two children, by name, from the parish of *Weobley*, in the county of *Hereford*, to the parish of *New Radnor*, in the county of *Radnor*. The Sessions on appeal quashed the order, subject to the opinion of this court on a case stating: That the pauper *H. Williams* was born in the parish of *New Radnor*, and being formerly an officer of excise, was, in the year 1790, resident in that capacity in the borough and parish of *Weobley*; and during such residence was rated to the land tax in that parish for his salary; which was proved by the production of the land tax assessment; but it appeared by the evidence of the pauper, that he never paid such rate himself, or any rate; the same being paid by the collector of excise, and not deducted out of the pauper's salary. The Sessions were of opinion that the pauper gained a settlement in *Weobley* by the rating and payment as before stated.

Gibbs, in support of the original order, said, that it was clear that a person must pay as well as be rated in order to gain a settlement; and here the pauper, though rated, had not paid either in fact by his own hand, or constructively by the hand of another; for the payment made by the collector was not deducted out of the pauper's salary.

Garrow, in support of the order of sessions, contended, that this was in effect a payment by the pauper, being made by another for him, and as his agent. That the amount not having been deducted from the pauper's salary made no difference; for whether the money were given him to pay for himself, or were voluntarily paid by another on his account was the same thing.

Lord KENYON, C. J. We cannot do better than abide by the act of parliament, 3 W. 3. c. 11. s. 6, which requires both that the pauper should be rated, and should pay, in order to gain a settlement. If the rate had been paid by him through the medium or by the hands of another, that would have been a payment by himself; but here he neither paid it mediately or immediately. He was not affected by the payment at all. It was not deducted out of his salary, nor was his income diminished by it. I know that the statute in question has been extended by construction much beyond what was apparently intended by the legislature. It has been decided, that being rated and paying to the land tax will gain a settlement, though, if it were *res integra*, I should rather think that the act was intended to be confined to parish rates. However, that having been decided otherwise, I shall not now disturb it. But this being a new case, where the pauper neither in fact paid the rate himself, nor constructively by the hands of his agent, it is better to abide by the letter and true spirit of the statute, and to hold that he did not thereby gain a settlement.

Per Curiam,

Order of Sessions quashed.

The King v. Holland.

2 East, 70. Nov. 21, 1801.

Where a power of creating freemen is shown to have been once vested in the body at large of a prescriptive corporation, the exercise of it cannot be sustained in a select part of the same corporation continued by charters under other names of incorporation; there being no express grant of such a power to the select body by any such charters, nor even any by-law to that effect, even supposing such a power could be transferred by a by-law from the whole to a part of the same corporation; although it be stated in the plea and admitted by the demurrer, that the same power which was immemorially exercised by the whole body down to the period of the granting and acceptance of the charters of *James I.* and *Charles 2.* had been since those charters, &c. continually exercised by the select body in question, and although such charters contained a confirmation of all former privileges, &c. under whatever names of incorporation theretofore enjoyed.

AN information in nature of *quo warranto* was exhibited against the defendant for claiming and exercising the office of freeman of the borough of *Okehampton* in the county of *Devon*, without any legal warrant. The defendant pleaded, that *Okehampton* is an ancient borough, consisting of an indefinite number of freemen, and that the burgesses, till the acceptance of the charter of *James the First*, were a corporation by prescription under various names, *viz.* "the burgesses of the free borough of *O.*," "the portreeve and commonalty of the borough," &c. and "the mayor and burgesses of the town and borough," &c.; and from the granting of the said charter till the surrender thereof by the name of "the mayor and burgesses of the town and borough," &c. and from such surrender until the charter of *Charles II.*, by the name of "the mayor and burgesses of the borough," &c.; and since then by the same name last mentioned; and during all the time there have been an indefinite number of freemen. The plea then set forth the charter of the 21st *James 1st*, whereby he granted that *Okehampton* should be a free town and free borough, and a corporation, by the name of the mayor and burgesses of the town and borough of *O.*; that there should be one of the burgesses to be called mayor, eight inhabitants of the town and borough called principal burgesses, eight other inhabitants of the town and borough or precincts called assistants; that the seven principal burgesses (exclusive of the mayor) and the assistants should be the common council. The charter then proceeded to appoint the first mayor, and seven others as principal burgesses, and eight assistants, and appointed the election of mayor to be on the *Monday* after *Michaelmas*, by the former mayor nominating two of the principal burgesses, one of whom should be chosen by the other principal burgesses not named, and the assistants, or the major part of them, and should hold his office for a year and until another mayor was chosen. And the same charter contained a ratification of all ancient rights, prescriptions, customs, privileges, &c. to the same corporation, under the several names of incorporation before mentioned. The plea then stated the acceptance of the charter. And that afterwards, in the 34th Car. 2. the same was surrendered, and such surrender enrolled; and that *Charles 2d* by his charter in the 36 Car. 2. granted them to be a corporation by the same name as in the former charter; and that one of the burgesses should be mayor, and that there should be eight principal burgesses and eight assistants (as before) who should altogether (exclusive of the one principal burgess who should be mayor) be a common council to assist the mayor, and that the common council, or the major part, assembled on public summons, together with the mayor, should have power to make by-laws for the good discipline and government of the town and borough, and of the officers, ministers, artificers, inhabitants, and residents, and for declaration in what manner and order the mayor, principal burgesses and assistants, and all and singular officers, ministers, &c. should conduct themselves in their offices, functions, trades and affairs, for

the further public good, common advantage, and good government of the town and borough, and victualling the same, and all *other matters and things* whatsoever touching or in any wise concerning the town or borough. The charter then appointed the election of mayor to be in the manner before described: and then set forth that no *stranger* or foreigner, *unless he be a freeman* of the town and borough, should sell or expose wares to sale in the borough, other than victuals. The same charter also contained a confirmation of all former liberties, privileges, customs, &c. as were lawfully used or enjoyed by any name of incorporation, and then required the oaths of supremacy and allegiance to be taken by all officers and ministers, and that *every person* thenceforward to be admitted to the freedom of the town and borough should previously take such oaths before the mayor. The plea then stated the acceptance of that charter, and that the corporation still continued by the same name, &c. It then set forth, that from time immemorial there has been an ancient custom there used that the burgesses, or the major part of them, under their various names of incorporation aforesaid, from time immemorial until the granting and acceptance of the charter of James I. were used and accustomed to admit and swear, and the said mayor and common council in common council assembled, or the major part of them, after the granting and acceptance of the said charter, and until the surrender thereof and inrollment, &c. were used and accustomed to admit, and the said last mentioned mayor to swear; and from and after such surrender, &c. until the granting and acceptance of the charter of Car. 2, the burgesses of the said town and borough under their then name of incorporation, or the major part of them, were used and accustomed to admit and swear, and from the granting and acceptance of the said charter of Car. 2, the said mayor and common council in common council assembled have used and been accustomed to admit, and the said last mentioned mayor hath sworn; and the said burgesses, or the major part of them, under their various names of incorporation during all that time until the granting and acceptance of the said charter of Ja. I. *ought to have* admitted and sworn, (and so on through the same changes as before), and the mayor and common council so assembled as aforesaid, or the major part of them, still of right ought to admit, and the said last-mentioned mayor to swear, as a freeman or freemen of the said borough, such fit and proper person or persons having attained the age of 21 years, as to them, &c. (respectively as before) should seem meet; and that every person so admitted and sworn a freeman have exercised, &c. the said office. The plea then set forth an election of the defendant to be a freeman according to such custom; that he was of age, and took the oaths, &c. and still is a freeman, &c. To this there was a general demurrer and joinder.

Dampier in support of the demurrer having opened the pleadings;

Lord KENYON, C. J. said, I observe that the plea states that *Okehampton* is a borough by description as well as by the charters of James 1st and Car. 2d, and it prescribes for a power to make honorary freemen vested in the whole body. To that I see no objection: but then it concludes by claiming the same power to be exercised by a part only or select body of the existing corporation; and this without shewing any charter granting to them such a power, or even without shewing any by-law to that effect. Not that I am prepared to say that such a by-law, if it had existed, would have been sufficient to have transferred the power from the body at large to a select part of it(1): but as it stands on the plea even without a by-law for that purpose, a part of the corporation have, there is no saying how, assumed to themselves a power which belonged to the whole body. This is impossible to be supported at any rate.

Burrough, for the defendant, admitted that the plea could not be supported

unless he could make out, which he would endeavour to do, that the body now exercising the right of admitting freemen was in effect the whole corporation, as representing them for this purpose.

Lord KENYON, C. J. That is impossible to be sustained when it is expressly stated to be only a part of the corporation.

Per Curiam,

Judgment for the Crown.

The King v. Clarke.

2 East 75. Nov. 21, 1801.

Upon an information in nature of *quo warranto* against one for claiming the office of alderman, if he disclaim, and judgment of ouster be given against him, he is concluded from shewing to a second information for exercising the same office, that he was duly elected before such first information and judgment of ouster, and that he was afterwards sworn in by virtue of a peremptory *mandamus* from this court. But *semble*, if the election to the office were good, and only the first swearing in irregular, the first judgment should not have been an absolute judgment of ouster; but either a judgment of *capiatur pro fine* only, for the temporary usurpation, or a judgment *quousque*, &c.

AN information in nature of *quo warranto* was exhibited against the defendant, calling upon him to shew by what authority he claimed and exercised the office of alderman of the town of *East Retford* in the county of *Nottingham*. The defendant by his plea shewed, that before and at the time of granting the charter aftermentioned, *East Retford* was a corporation by prescription, by the name of the bailiffs and burgesses of the town of *East Retford*. That James 1st by his charter. (8 Jac. 1.) granted them to be a corporation by the same name; having two chief magistrates, a senior and a junior bailiff, and twelve burgesses to be called aldermen. That the two first nominated bailiffs, and the burgesses at large should meet and choose the twelve first aldermen, who should be sworn, and execute their offices for life, unless before removed for reasonable cause and that the aldermen should be the common council to assist the bailiffs. That on the first *Monday* in *August* of every year, the bailiffs and burgesses, or the major part, should choose one of the aldermen to be senior bailiffs, who should be sworn, and should execute the office for a year and till another was chosen. And that on the same day, the bailiffs and aldermen, or the major part, should nominate two burgesses, of whom the bailiffs, aldermen, and burgesses, or major part, should choose one to be junior bailiff, who should be sworn and execute his office for the same period. It also made provision for another election in case of the death of either of the burgesses within the year. That on the death or a motion of an alderman, the bailiffs and residue of the aldermen, or major part, should nominate two burgesses, of whom the bailiffs, aldermen, and burgesses should choose one to be alderman of common council, and that he so as aforesaid to the office of alderman &c. elected and appointed, and sworn before the bailiffs of the town on his oath, the office of alderman, &c. well and faithfully to execute, should be of the number of twelve aldermen of common council, &c. It then stated the acceptance of the charter; and that on the 25th *March* 1795, *W. M.* an alderman died. That on the 31st *July* 1795, the bailiffs and residue of the aldermen met and appointed the defendant *Clarke* and one *Barcker*, who were burgesses, as candidates for the vacancy, and that the bailiffs, aldermen, and burgesses did choose, name, and appoint the defendant to be an alderman: and that on the 23d *November* 1796, the defendant was in due manner sworn before the two bailiffs; by reason whereof he claimed, &c.

The replication, after taking issue on the grant and acceptance of the charter of James 1st, and on the choice, nomination, and appointment of the defendant to be alderman, further pleaded, that after the supposed choice, nomination, and appointment of the defendant to be alderman, and before his swear-

ing in, and before the exhibiting of this information, i. e. in *Hilary* term 1796, an information was filed against the defendant for *using and exercising* the office of one of the aldermen of *East Retford*, for a certain time in the said information mentioned, without legal warrant, and prayed that due process of law might be awarded against him in that behalf, to make him answer and shew by what authority he claimed, &c. That such proceedings were thereupon had, that in *Easter* term 1796, the defendant did disclaim the said office, liberties, privileges, and franchises in the said information specified, and did not deny but that he had usurped the said office, &c. during all the time alleged : &c. whereupon by the said court, &c. it was adjudged, that the defendant should not intermeddle with, &c. the said office, liberties, &c. ; but be *absolutely forejudged and excluded from ever exercising or using the same, or any of them, for the future*. It then set forth the *captur* and award of costs to the relator, &c. It then averred, that the defendant was never chosen, nominated, or appointed to the office of alderman since the rendition of the said judgment. There was a second replication, the same as the former, only stating that after the nomination, and before the exhibiting of this information, the former information was exhibited, &c. omitting the mention of the swearing in.

Rejoinder, that after the defendant was so chosen, nominated, and appointed to be alderman, and after the rendition of the judgment in the plea mentioned, and before the defendant was sworn in, to wit, in *Michaelmas* term 1796, a peremptory *mandamus* issued out of this court at the prayer of the defendant to the bailiffs of *East Retford*, (reciting his nomination, &c.) to swear him into the office of alderman, in obedience to which writ he was accordingly duly sworn in before the bailiffs. The like rejoinder to the second replication. To both which there was a general demurrer on the part of the crown.

Dampier in support of the demurrer. The question is, Whether an absolute judgment of ouster between the election to an office and the swearing in is not a total exclusion of the party from the office ; so that no right can be acquired therein without a new election. Nothing can be stronger than the terms of the disclaimer and judgment, by which latter the defendant is *absolutely forejudged and excluded from ever exercising or using the office for the future*. After such a judgment no latent right can remain upon which the swearing in can operate. Unless the issuing the *mandamus* to swear him in can make any difference, the point has been expressly decided in *R. v. Pender*(a), where to an information for exercising the office of mayor of *Penryn*, the defendant pleaded his election and swearing in : and on the trial the jury having found his election, but not the swearing in, judgment of ouster was given against him, which was affirmed upon error brought in Dom. Proc. In the reasons(b) there given for reversing the judgment, it is insisted that that part of the judgment which excluded him from the office was erroneous, because his right to it was established by the finding that he was duly elected : and yet that whilst the judgment of ouster stood, the plaintiff (in error) *could not have the effect of a mandamus from B. R. to be sworn into the office, though the legality of his election was not disputed*. On the other hand, the legality of the judgment was defended upon the stat. 9 Ann. c. 20. And that it being expressly required by the charter, that the oath of office should be taken before the party were admitted to execute the office, the justification being entire was destroyed by the finding that he was not duly sworn, and consequently the judgment of ouster was the only legal judgment adapted to the case. The result of this reasoning goes to shew, that if the whole matter had been brought in discussion before the Court, they would not have granted the per-

(a) Cited in *R. v. Recks*, 2 Ld. Ray. 1447.

(b) 3 Bro. P. C. 173, 7. [Vol. 2 p. 294, of Toml. edit.]

emptory *mandamus* in this case. And as the then bailiffs might have acted in collusion with the defendant in not resisting the *mandamus*, that ought not to influence the present decision ; for it is no more in effect than if the bailiffs had sworn him in without a *mandamus*. This very point was decided in the case of *R. v. Hearle*, 1 Stra. 625, upon an application by *Pender* himself for a *mandamus* to swear him into the office to which he had been elected ; which was refused by the Court in consequence of the judgment of ouster, which, as the chief justice said, did away the election : though, as *Reynolds*, J. said, there ought properly to have been a judgment of ouster *quousque* only, upon the finding of the jury on the former information. Then, if the *mandamus* issued improperly in this case, it cannot vary the question, being supersedeable like all other writs issued by the court. If, notwithstanding the absolute judgment of ouster against the defendant, there were any latent right to the office remaining in him, the Court did wrong in refusing the *mandamus* in *Hearle's* case : for the only effect of the writ is so far to put the party in possession of the office in fact, as to enable him to try his right to it ; but a *mandamus* confers no title in itself. *Basset v. The Mayor of Barnstable*, 1 Sid. 286 ; *R. v. Dean and Chapter of Dublin*, 1 Stra. 543, and *R. v. Ward*, 2 Stra. 896. Then how can the award of a writ of *mandamus*, on which no error lies, do away the effect of a judgment unreversed ? The case of *The King v. Pender* was much stronger than the present, because there the election was found to be good, and the judgment of ouster proceeded wholly upon the insufficiency of the swearing in ; but it does not appear here on what the disclaimer or the judgment was founded ; it might have been as well upon a surrender or amotion or forfeiture, as upon the insufficiency of the swearing in. When questioned by the king as to his claim and user of the office, he admitted that he had no claim or right to exercise it : then he is estopped from afterwards insisting that he had any title at that time. Great inconvenience would ensue from such a temporary secession, and subsequent resumption of an office. The vacancy may be filled up in the mean time. Within what interval may the office be resumed ? Will the title refer back to the election ? If so, a secession by disclaimer on an information in nature of *quo warranto*, and a subsequent swearing in, will make a bad title indefeasible. It is, therefore, more consonant, to principle as well as to authority, to say, that the title being entire, the judgment of ouster, though grounded on a defect in part, vitiated and did away the whole ; and therefore that the defendant can only protect his title by shewing a new and legal election and swearing in subsequent to that judgment.

Yates, contra. It is not contended that the *mandamus* to swear in the defendant could of itself confer any right to the office ; but his title arises on the prior nomination and election, which were regular and legal : but without a due swearing in the defendant was not authorized to exercise the office, and therefore he disclaimed, not the legality of the election ; for that was the franchise of the electors, and not his own ; but the right to use the office, not having been properly sworn in. It was not competent to the defendant to disclaim the right which the electors had of appointing him to the office of alderman ; if that were so, any man might contrive to evade the holding of a burthensome office in a corporation by getting a friendly information to be filed against him, and thereupon disclaiming. Admitting that the title is entire, if any part of it be different from that before set up, and upon which the judgment of ouster was given, that judgment is not conclusive. A judgment is only conclusive on that which was in controversy before, *Seddon v. Tutop*, 6 Term Rep. 607. Now here the title set up is different in part, and being entire, is therefore different *in toto*, from that before judged : for it appears to be founded on a swearing in after the prior judgment. In *R. v. Hearle*, 1 Stra. 627, the chief justice gave no reason for the conclusiveness of the judgment,

but the mere form of it: and the only decision of the House of Lords, 3 Bro. P. C. 178 [p. 505. Toml. edit.] on that case was, that no writ of error lay upon the award of a peremptory *mandamus*. That case, therefore, concludes nothing as to the principal question. The case of *The King v. Pender*, referred to in the book cited, 2 Ld. Ray. 1447, is reported in *Strange*, 1 Stra. 582. S. C. 8 Mod. 234, by the name of the mayor of *Penryn's* case. And there the court say, that the acting without being sworn was certainly an usurpation, for which they were bound to pronounce judgment against him upon that record. But so far from considering that the judgment of ouster concluded him from insisting upon the prior good election, they said, that if it were not too late he might have a *mandamus* to swear him in; though they must punish him for his usurpation hitherto. In the mayor, &c. of *Colchester v. Seaber*, 3 Burr. 1866, after judgment of ouster against all the corporators, yet it was holden that the prescriptive rights of the old corporation might be revived by a new charter to the same body. [Lord Kenyon, C. J. That case did not pass without much doubt at the time. The justice of the case helped to get over difficulties in it.—*Lawrence*, J. It was much questioned in *R. v. Pasmore*, 3 Term Rep. 199, and *R. v. Beilringer*, 4 Term Rep. 810.] At any rate, the court in the case of *R. v. Biddle*, 2 Stra. 952, which was subsequent to the mayor of *Penryn's* case, disapproved of that judgment; for an usurpation being confessed as to part of the time charged in the information, for which time the prosecutor had entered judgment of ouster, the court, upon motion, ordered it to be expunged, except as to the *capiatur pro fine*; as they said it would be hard that a good election should be thus done away: and they distinguished it from *Pender's* case, where he was guilty of an usurpation during all the time charged in the information. So here this was a mere temporary usurpation. Though a *mandamus* to swear in an officer would not of itself confer a title upon him to the office, yet it is not altogether nugatory. At least it imports an acknowledgment by the judgment of the court of antecedent title in the party: and it having been granted in this case immediately subsequent to the disclaimer and judgment of ouster upon an affidavit of the prior election, shews that such judgment was not considered as absolutely conclusive against the validity of the election. If a *mandamus* operated nothing as to the title, it would be nugatory to make a return, or to traverse such return: for the title might as well be tried at any subsequent time. But it is considered of so much consequence, that, in an action for a false return, the court will not suffer the propriety of issuing the writ to be questioned. *Green v. Pope*, 1 Ld. Ray. 126. The defendant's title ought to have been disputed, if at all, upon the application for the *mandamus*. And in *R. v. Turner*, T. Jones, 215. sed vide *R. v. Harris*, 3 Burr. 1422, the court refused, ever at the prayer of the attorney-general, to grant a *mandamus* to swear one in as mayor, after a peremptory *mandamus* before granted to swear another into the same office.

LORD KENYON, C. J. The question is abundantly clear of all doubt. *The King v. Hearle* has confirmed my first impressions on reading this case. It is the language of all the cases that a *mandamus* to swear in confers no title. It is the consummation of the party's title, if he have one, but it gives him none. It is frequently granted merely to enable a party to try his title. What is this case? Upon an information exhibited against the defendant for usurping the office of alderman of *East Retford*, he was so conscious of not having any defence, that he disclaimed, not on any particular ground, but generally; thereby admitting his usurpation; upon which there was judgment of ouster against him, whereby he was absolutely forejudged and excluded from ever using the office in future. If this were not to conclude him from insisting upon the same election again, I know not what would. Suppose after this an application had been made to the court for a *mandamus* to compel the corporation to proceed to a new election to fill up the vacancy, what resist-

ance could have been made to it? and yet if the prior election could be resorted to again, it could be of no avail: or there might be two persons filling one office at the same time. If the defendant could insist on the former election, he would also be entitled to a *mandamus* to swear him in: and thus the proceedings of the court would become utterly inconsistent. It was for that reason the court refused the application for a *mandamus* in *Turner's* case. I do not meddle with the question, whether the judgment here on the former information might have been entered in a different way. I do not say what the effect would have been if the judgment had been prayed to be entered up only for the *capiatur pro fine* for the time during which the defendant usurped by acting in the office before he was duly sworn in. The court, no doubt, on such an application, would have done what justice required. Perhaps it might have been thought that a judgment *quousque* only would have answered the purpose until the title were consummated by a proper swearing in. The case of *The King v. Biddle* turned on this very distinction. But if this attempt would serve, there is a good receipt, as was properly observed, for making a bad title good, by a swearing in at the end of six years after a judgment of ouster. There ought to be an end of controversy after a judgment upon the matter. Is it not the same in real actions; if the party fail in his action he is bound for ever. Here is an absolute judgment of ouster, and without any attempt to reverse it for error, or by shewing fraud, it is endeavoured in this manner to render it of no avail. That cannot be permitted. Therefore, both on authorities, reason, and analogy, I think the demurrer is well founded.

GROSE, J. declared himself of the same opinion.

LAWRENCE, J. As to the *mandamus* giving any title, it has long been considered otherwise. And not long ago, in the case of *The King v. The Burgesses of Truro*, 35 Geo. 3. an application for a *mandamus* to swear one in as mayor, was resisted on an objection to the legality of the election; but the answer given was, that the defendants might return the special matter, so as to enable the party to try the validity of his election. But no idea was entertained that the *mandamus* conferred any title upon him.

LE BLANC, J. of the same opinion.

Judgment of ouster.

Ex parte Maxwell.

2 East, 85. Nov. 21, 1801.

An annuity granted in 1790, the grantee of which died in 1794, and the interest of which was regularly paid till 1800 without objection, shall not be impeached for a supposed defect of consideration, which might have been explained by the grantee if living. And *semble*, that an annuity paid without objection for more than six years shall be protected by analogy to the statute of limitation against any such objection dehors the memorial, without strong reasons to the contrary.

A RULE was granted, calling on the executors of *John Broomhead*, deceased, to shew cause why the bond, warrant of attorney, and indenture given to secure an annuity should not be delivered up to be cancelled, and why the annuity thereby granted should not be set aside. This was founded upon an affidavit of *William Maxwell*, setting forth the memorial of the annuity of 20*l.* during the life of *Maxwell*, secured on the said instruments out of certain trust money, for which the consideration was stated to be 140*l.* paid in hand by *Broomhead* to *Maxwell*, in manner mentioned in the indenture for securing the same: which indenture, dated 21st August 1790, and the receipt of the money, was witnessed by *R. M.* servant to *Broomhead*. The affidavit also set forth the manner in which the consideration money was paid, viz. 50*l.* in bank notes, 69*l.* 10*s.* by a banker's draft, dated the same 21st of August, and

paid that day; and that the remaining 20*l.* 10*s.* was at the same time retained by *Broomhead* for the costs and charges of preparing the securities.

Dampier shewed cause upon an affidavit made by *J. Broomhead*, the son of the deceased *J. Broomhead*, stating that his father died in *January* 1794, and that the annuity was regularly paid to him in his lifetime, and since his death to the deponent as his acting executor until *June* 1800, without objection on the part of the grantor. That at the time of the sale of the annuity, and for three years afterwards, the deponent was living apart from his father as clerk to another person, and was not present at or privy to the transaction. That the other executors of his father never acted, and were also unacquainted with what passed at the time of the purchase of the annuity. He relied on these circumstances to shew that the Court would not interfere to set aside the annuity after the grantor had lain by so long, and till after the death of the grantee, who alone could give any account of the transaction to those concerned on his behalf; for the witness to the deeds, though still living, was merely a servant, and knew nothing of the transaction. And he cited *Poole v. Cabanes*, 8 Term Rep. 328, where the Court objected to granting a similar application, because the grantor had paid the annuity till after the death of the person by whom it had been negotiated on the part of the grantee, and who alone could have answered the objections raised on the part of the grantor.

Garrow and *Wigley* in support of the rule (being desired to confine themselves to answer this objection) said, that this was distinguishable from what was thrown out by the Court in the former case, inasmuch as the witness was still alive, who might have explained what passed at the time the instruments were executed: and ultimately the annuity there was set aside for a defect appearing on the face of the memorial. That if the payment of an annuity for a few years were holden to conclude the grantor from shewing a defect of consideration, it would tend greatly to impede the beneficial operation of the annuity act, 17 Geo. 3. c. 26, as distressed persons were not often in a condition to right themselves soon after they had made improvident bargains, in which undue advantage had been taken of them.

Lord KENYON, C. J. I feel no difficulty in disposing of this case. During the life of the grantee no objection was taken to the annuity, and the interest was regularly paid; and this has been continued to be done for near seven years since his death, down to the middle of the year 1800. And now for the first time it is attempted to rip up the whole transaction for a supposed defalcation in the payment of the consideration money. I know not where such a mischief is to stop if this could be permitted. This may be the only provision made for the younger branches of a family. The legislature, for the safeguard of the subject in their personal dealings with each other, have thought it wise to pass a statute of limitation, 21 Jac. 1. c. 16. s. 8, to personal actions. I know not why that should be disregarded in this more than in other instances. It is a circumstance deserving of weight, that more than the period fixed by that statute, which affects personal property, has run out, without any attempt to impeach this transaction; and I think we should be doing great mischief if we were to give way to this application.

Per Curiam,

Rule discharged.

Penton v. Robart.

2 East 88. Nov. 28, 1801.

To trespass for breaking and entering, &c. and pulling down and taking away certain buildings, &c. The defendant as to the breaking and entering suffered judgment by default, and pleaded not guilty as to the rest. Held that such plea was sustained by shewing that the building taken away, which was of wood, was erected by him as tenant of the premises on a foundation of brick for the purpose of carrying on his trade, and that he still continued in possession of the premises at the time when, &c. though the term was then expired.

TRESPASS for breaking and entering a certain yard and divers buildings, &c. of the plaintiff at *Battlebridge* in the county of *Middlesex*, and there without the leave and licence of the plaintiff breaking down and pulling to pieces the said buildings, &c. and the materials of a certain fence belonging to the said yard, and for taking away certain timbers, bricks, lead, &c. and disposing thereof to the defendant's use. As to the breaking and entering the yard, the defendant suffered judgment by default, and as to the rest of the trespasses, pleaded the general issue. At the trial before Lord *Kenyon*, C. J. at *Westminster*, it appeared that certain land, including the spot in question, had been let for a term by the plaintiff to one *Gray*, whose executors had let off part to one *Cotterell*, under whom the defendant was in possession as an under tenant; having had permission from *Cotterell* to erect a building thereon for the purpose of making varnish. This building had a brick foundation let into the ground, with a chimney belonging to it, upon which a superstructure of wood, brought from another place where the defendant had carried on his business, was raised, in which the defendant carried on his trade. The original term expired at *Michaelmas* 1800, in consequence of a proper notice to quit given by the plaintiff to the executors of *Gray*: (and it was admitted, that the plaintiff had recovered judgment in ejectment against this defendant for these very premises; though that fact was not proved at the trial). But the defendant remained in possession for some time afterwards, and was in fact in the possession of the premises at the time when he pulled down the wooden superstructure, and carried away the materials, which was the subject of the present action. A verdict was taken for the plaintiff, subject to the question, whether the defendant were warranted in pulling down the building and taking away the materials, after the expiration of the term. And a rule *nisi* having been obtained on a former day for entering a verdict for the defendant as to all but the trespass confessed of breaking and entering the yard:

Mingay and *Reader* shewed cause against the rule. Admitting that by the latitude which modern determinations had given to tenants to remove certain fixtures annexed to the freehold, for the purpose of carrying on trade, the defendant might, during the continuance of the term, have removed the building in question, still he had no right to do so after the term was expired; for in that case he is a trespasser by the very act of coming or continuing upon the property, which is indeed admitted by the defendant on the record; and the law cannot involve such a contradiction as to give a man a right, and yet make him a trespasser in the only act by which he can exercise it. (Lord *Kenyon* asked, whether if he had left any personal chattel on the premises, as a hogshhead of wine, he would not have been entitled to it after the term?) There is a difference between mere personal chattels, the property of which remains in the owner till divested by some lawful act of his, and things which are annexed to the freehold, which, generally speaking, vest in the landlord by act of law. If a tenant were to leave marble chimney pieces, which he had erected during the term, he could not come at any time afterwards and take them away. Lord *Hardwicke's* opinion is express to that point in *Ex*

parte Quincey, 1 Atk. 477. So in *Fitzherbert v. Shaw*, 1 H. Blac. 268, though it was admitted that the defendant might have removed the erections of this kind he had made during his tenancy, yet it was ruled that he had no right so to do after the expiration of the term.

Garrow, contra, was stopped by the court.

LORD KENYON, C. J. The old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier: but in modern times the leaning has always been the other way in favour of the tenant, in support of the interests of trade which is become the pillar of the state. What tenant will lay out his money in costly improvements of the land, if he must leave every thing behind him which can be said to be annexed to it. Shall it be said, that the great gardeners and nurserymen in the neighbourhood of this metropolis, who expend thousands of pounds in the erection of green-houses and hot-houses, &c. are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand, in the necessary course of their trade. If it were otherwise, the very object of their holding would be defeated. This is a description of property divided from the realty(1). And some of the cases have even gone further in favour of the executor of tenant for life against the remainder-man, between whom the rule has been holden stricter; for it has been determined that the executor of tenant for life was entitled to take away the fire engine of a colliery. The case of *Fitzherbert v. Shaw* turned upon the construction of an agreement that such things should be left on the premises, and decided nothing against the general principle. Here the defendant did no more than he had a right to do; he was in fact still in possession of the premises at the time the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them.

LAWRENCE, J. It is admitted now that the defendant had a right to take these things away during the term: and all that he admits upon this record against himself, by suffering judgment to go by default as to the breaking and entering, is that he was a trespasser in coming upon the land, but not a trespasser *de bonis asportatis*; as to so much, therefore, he is entitled to judgment.

Per Curiam,

Let a verdict be entered for the Plaintiff as to the trespass in breaking and entering, damages 1s.; and for the Defendant as to the rest of the trespass(2).

(1) But in a late case at *Nisi Prius* before Lord Ellenborough it was held to be waste for an outgoing tenant of garden ground to plough up strawberry-beds, which he bought when he entered of a former tenant. *Watherell v. Howells*, 1 Campb. 227. See the cases on the subject of fixtures collected in a note to *Horn v. Baker*, 9 East 246.

(2) [The authority of the case of *Penton v. Robart*, so far as it would authorize a tenant tortiously holding over, to remove fixtures, seems to be well shaken. Lord Ellenborough, and Lawrence, J. in *Elwes v. Man*, 3 East, 45, threw doubt upon one of the points laid down by Lord Kenyon; and Mr. Gibbons, in his Manual of the Law of Fixtures, considers the whole case opposed by other and later cases. See *Gibbons on Fixtures*, pp. 23. 30; & 41, and authorities cited by him. In *Massachusetts*, a tenant has the privilege of removing all such improvements from the freehold, as he has placed there, the removal of which will not injure the premises or render them in worse plight than when he entered. So, shrubs and trees in land leased for a nursery, are personal chattels, as between landlord and tenant, and may be removed by the latter. *Whiting v. Brastow*, 4 Pick. 310. *Miller v. Baker*, 1 Met. 27. In *Pennsylvania*, the law is more strictly conformable to the modern English decisions; for it is there held, that even as between landlord and tenant, fixtures erected by the latter, and which he is entitled to remove, must be removed during the term; after the expiration of the term, the tenant can neither remove them, nor recover their value from the landlord. Between tenant for life or his lessee, and the remainder-man, the rule prevails still more strictly. *White v. Arndt*, 1 Wh. 91.

Upon the general doctrine of fixtures, see the learned and elaborate judgment of J. Cowen,

Haycraft v. Creasy.

2 East, 92. Nov. 23, 1801.

To an inquiry concerning the credit of another, who was recommended to deal with the plaintiff, a representation by the defendant that the party might safely be credited, and that he spoke this from *his own knowledge*, and not from hearsay, will not sustain an action on the case for damages on account of a loss sustained by the default of the party, who turned out to be a person of no credit; if it appears that such representation were made by the defendant bona fide, and with a belief of the truth of it; for the foundation of the action is fraud and deceit in the defendant and damage to the plaintiff by means thereof. And taking the assertion of *knowledge secundum subjectam materiam*, viz. the credit of another, it meant no other than a strong belief founded on what appeared to the defendant to be reasonable and certain grounds.

IN an action on the case for making a false representation of another's credit, the declaration stated, that the plaintiff, at the time of making the several *false, fraudulent, and deceitful* representations after-mentioned, was an ironmonger carrying on his trade, and that the defendant before the said time, &c. had recommended one *E. F. Robertson*, to deal with the plaintiff in the way of his trade: and thereupon just before the making of the false representations, &c. *J. H.* the younger, the son of the plaintiff, had on his behalf applied to the defendant to inquire of him as to the safety of giving credit to the said *Robertson*; yet the defendant, well knowing the premises, but contriving and intending to injure the plaintiff, and to induce him to give credit to *Robertson*, falsely represented to the said *J. H.* the younger, "that the plaintiff would be perfectly safe in giving credit to the said *Robertson*, as "he (the defendant) *knew*, that she (*Robertson*) was then in possession of "considerable property by the death of her mother, and was in expectation of "a much greater by the death of her grandfather, who had been bed-ridden a "considerable time." It also averred, that the defendant falsely represented to one *Joseph Haycraft*, who had applied to him on behalf of the plaintiff, in order to inquire whether the plaintiff might trust said *Robertson*; "That she " (*Robertson*) was a lady of great fortune, and much greater expectations, and "that he (the defendant) *knew* that the plaintiff might credit her (*Robertson*) "to any amount with perfect safety." It also laid other expressions to the same effect, and particularly concerning *Robertson's* relationship to certain persons of note. And then averred, that by means of the said several false representations of the defendant, the plaintiff confiding therein, gave credit to *Robertson* for divers goods, &c. sold and delivered to her, to the amount of 485*l.*; and then concluded, that in fact, at the time of the said several false representations, it was not safe to give credit to *Robertson*, and that she was

in *Walker v. Sherman*, 20 Wend. 636. Chancellor *Kent* has collected the American cases in the 2d vol. of his Commentaries, p. 345, 3d ed. note c. In *Pennsylvania*, the rule of determining whether certain articles are real or personal estate, by the criterion of actual and permanent fastening, has been disregarded. Machinery, although not actually fastened to the freehold, is part of it, where the articles are constituent parts of the manufactory to the purposes of which the building has been adapted, and without which it would cease to be such manufactory. This is as between vendor and vendee, heir and executor, debtor and execution creditor; but not as between tenant and landlord, and remainder-man. See *Voorhies v. Freeman*, 2 W. & S. 116. *Pyle v. Pennock*, do. 390. In *New-York*, the rule is substantially the same as in *Pennsylvania*, although rather more favorable to tenants; for if the tenant enter after the term expired, to remove fixtures erected by him for manufacturing purposes, he may be liable as a trespasser, but the property in the articles remains in him. *Holmes v. Tremper*, 20 Johns. 29. *Raymond v. White*, 7 Cow. 319. *Miller v. Plumb*, 6 do. 666.

Both the English and American authorities have a stronger tendency to consider fixtures for the purposes of trade as mere personal property, than those of an agricultural or domestic character.—W.]

was not in possession of considerable property, &c. nor in expectation of greater, &c. and so negating all the other representations of the defendant; (but not alleging that the defendant knew them to be false at the time), on the contrary, that *Robertson* was then wholly unworthy of credit, and unfit to be trusted, &c. and that the said sum of 435*l.* was still due to the plaintiff, who, by means of the several premises, was likely to lose the same. There were other counts laying the representations in different ways.

At the trial before Lord *Kenyon*, C. J. at the sittings at *Guildhall*, the transaction which led to the representations in question appeared in substance to be this. A Miss *Robertson*, (the person named in the declaration,) who had formerly been a teacher at a school, in which capacity the defendant had first become acquainted with her, having had children at that school, on a sudden, some little time before the transaction happened, gave herself out to the world as a person of considerable fortune, which had devolved upon her by her mother's death, and with still greater expectations from her grandfather and other relatives. Upon the strength of these assurances she contrived to obtain credit to a considerable amount from a number of persons, and settled herself in a large house at *Blackheath*, fitted up in an expensive manner, kept a carriage, exhibited a great show of plate, and other marks of affluence, talked of her relationship to persons of note: by means of all which she imposed on great numbers of persons, who believed her to be the character she had assumed, and visited her as such. Amongst other things she pretended to be the owner of a considerable estate in *Scotland*, from the rents of which she had been kept out for about 40 years, but had then lately got into possession; and in support of these pretensions she exhibited supposed plans of the estate, with admeasurements of the woods, &c. and actually appointed a respectable man of business as her agent or steward, to receive the rents, &c. from whom she took bond to a large amount, as security for the faithful discharge of his functions. All these and other like appearances were proved to have been continually exhibited to the eyes of the defendant, who was a currier at *Greenwich*, near which Miss *Robertson* lived. And though some attempt was made by evidence to implicate him in the fraud that was going on, yet upon the result nothing of that sort was established against him: but it appeared that he himself had been duped by these appearances, and had actually lent her his acceptances, to the amount of above 2000*l.* upon the strength of them; for which he had not taken any security at the time the representations were made; though some months after and before the final exposure of the imposition, and the absconding of Miss *Robertson*, he had obtained of her a bond and warrant of attorney to secure his advances. The particular circumstances which led to the present action were these; about *May* or *June*, while Miss *Robertson* was fitting up her house at *Blackheath*, application was made on her behalf by the defendant to the plaintiff's son (who conducted the ironmongery business in his father's absence), the defendant, stating that he had recommended Miss *Robertson* to come to the plaintiff for such articles as she might want in the way of his business. The plaintiff's son inquired as to her responsibility, she being an entire stranger to him and his father; to which the defendant answered, "your father may credit her with perfect safety; for *I know of my own knowledge* that she has been left a considerable fortune lately by her "mother, and that she is in daily expectation of a much greater at the death "of her grandfather, who has been bedridden a considerable time." The defendant afterwards came with Miss *Robertson* and her companion, (also known to the defendant for many years before as the keeper of the same school,) and they looked out and ordered articles to a large amount. The plaintiff's son swore at the trial that he dealt with them entirely on the defendant's information. Finding the order, however, to be so large, the son again asked the defendant if he were certain as to the representation he had made; who again answered with the same certainty, and never expressed any doubt. The

son thereupon wrote to the plaintiff, and in consequence of the answer he received, applied to his uncle to see the defendant on the business. Upon this latter's application to the defendant for the same purpose, the defendant repeated his assertion that Miss *Robertson* was a person of great fortune and greater expectations, and was related to certain persons of rank whom he named; and added, "*I can positively assure you of my own knowledge, that you may credit Miss Robertson to any amount with perfect safety.*" Various other assertions to the like effect were proved; but particularly on one occasion, after representations of this sort had been made to the plaintiff's brother, the latter said to the defendant, "I hope you do not inform me this *upon bare hearsay*; but do you know the fact yourself?" The defendant answered, "*Friend Haycraft, I know that your brother may trust Miss Robertson with perfect safety, to any amount.*" The jury found a verdict for the plaintiff for 485*l*.

A rule was obtained, calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had, on the ground that there was no fraud or deceit in the defendant making the representation in question, though he had incautiously averred that to be within his own *knowledge*, which in strictness he could not be said to *know*, but only had reasonable and probable cause to believe, and did in fact believe to be true at the time: and that without fraud, the action was not maintainable, though the representation turned out to be false.

Erskine, Garrow, Gibbs, and Lawes shewed cause against the rule. This action is bottomed upon the same principles which governed the cases of *Pasley v. Freeman*, 3 Term Rep. 51, and *Eyre v. Dunsford*, 1 East, 318; here is the *damnum* and *injuria* concurring; the deceit in the defendant, and the injury and loss to the plaintiff. The *sciens* is considered as equivalent to the *fraudulenter*. *Leakins v. Clissel*, 1 Sid. 146. 1 Keb. 522. It was well said in those cases, that if one be applied to for information as to the credit of another, it is optional in him whether or not he will answer the inquiry; but that if he do, he is bound to answer truly. This is a case where the defendant not loosely or inadvertently, but after grave warning, deliberately asserted a fact of his own knowledge, which is averred and proved to have been false. It matters not to the plaintiff whether the defendant knew it to be false at the time; the injurious consequence is the same to him: nor is it less culpable in the defendant, whether he knew it to be false, or, which is the same thing, did not know it to be true. If he asserted that of his knowledge which he did not know to be true, and that at least is proved by the event, the imposition upon the plaintiff is the same, and the law holds him responsible for the consequences. It is difficult, and sometimes impossible, to trace the motives which induce such declarations; though there is no doubt that for the most part they proceed from some sinister motive or expectation of advantage to the party. And here it appeared that Miss *Robertson* was considerably indebted to the defendant himself at the time, as well as some other casual circumstances, which might induce a jury to account in this manner for the earnest anxiety which he shewed to establish the opinion of her credit in the world. But at any rate, it was fully established in the cases referred to, that it was not necessary to the maintenance of the action, that the defendant should have any interest at the time in making the false representation; it is enough if it be false, and be made deliberately, and that the consequences are injurious to the plaintiff, who gave credit to it. Suppose a man imposed upon by a servant, out of pity to his apparent distress, were to give a character of him to another, and asserts facts in his favour as of his own knowledge, which he no otherwise knew than by the declaration of the servant himself; in consequence of which the other took him into his service, and was immediately robbed by him; and it turned out that the whole representation was false; but that the maker was actuated solely by mistaken mo-

tives of compassion to state that which he did not know to be true ; upon what principle of justice could he excuse himself on account of such motives, for hazarding an assertion so injurious to another in its consequences. If one assert absolute knowledge of a fact, which he does not know, but has only reason to believe; he cannot but know that his assertion is false, whether the fact asserted turn out to be true or not. The case is much stronger against such an one when, as in this case, his attention is drawn at the time to the distinction between knowledge and mere hearsay : for however propitious appearances may be, a man may refuse to credit them without the actual knowledge of the party to whom he applies for information. It can be no defence, therefore, that the defendant was himself duped, or that he *believed* that the vendee was a person of the credit he represented her to be, or even that he had reasonable grounds for such belief ; for his representation went further than this, and unless it had, it is probable the credit would not have been given. There is no foundation for the objection that this is an attempt to evade the statute of frauds ; for that was only meant to indemnify persons from collateral undertakings for the debts of others, where no fraud had been practised to induce the credit : and at any rate, that objection would equally have applied to the cases of *Pasley v. Freeman* and *Eyre v. Dunsford*, where it was made and over-ruled.

The Attorney-General, Dallas, Marryat and Comyn, contra. It was not attempted to go to the jury on the question of fraud ; but it was insisted that the defendant had too credulously believed the appearance of credit assumed by Miss *Robertson*, and that he had exceeded his duty in stating his *knowledge* of that which he only *believed*, without knowing it to be true : and on this ground the case was left to the jury to find for the plaintiff. The question then is, Whether the averment of knowledge concerning a matter like credit, of which perfect mathematical knowledge cannot be predicated, and which at most can never amount to more than a high state of belief, makes the party liable for the consequences to another trusting to such a representation ? All the cases upon this subject were fully investigated in *Pasley v. Freeman* : and *Grose, J.* there said, 3 Term Rep. 53, that he had met with no case of an action upon a false affirmation, except against a party to a contract : and it may fairly be assumed, that previous to that determination there was no such case to be found ; for *Buller, J.*, who entered largely into the authorities in support of the contrary opinion, did not produce any direct authority in support of it. All the cases mentioned by him were cases of fraudulent assertions by one of the contracting parties. What is said in *Risney v. Selby*, Salk. 211, as to the tenant's falsely affirming to a purchaser that the rent was higher than it really was, amounts to no more than this, that the rent being a matter lying within the knowledge of the landlord and tenant, if *they* (i. e. the landlord and tenant) were parties to the contract of sale, the action would lie against them. But it is not said that the action would lie against the tenant alone, falsely affirming as to the value of the landlord's estates, if he were no party to the contract between the landlord and a purchaser. But without impeaching directly the judgment delivered in *Pasley v. Freeman*, concerning which, however, much doubt has been entertained, it is sufficient to observe, that all the cases hitherto have proceeded on the ground of an intended deception by making the false representation, and many of them with a view to the person's own benefit who so made it. In *Pasley v. Freeman*, though there was no benefit to the defendant, yet the judgment went expressly on the ground of fraud. *Buller, J.* said throughout, that the foundation of the action is *fraud* and *deceit* : and relied mainly on the fact, that the defendant knew the representation to be false. And he cited Mr. Justice *Twysden's* opinion in *Leakins v. Clissel*, 1 Sid. 146, with approbation, that fraud must be proved to maintain the action. The new trial in *Eyre v. Dunsford*, 1 East, 318, was refused on the ground that there was sufficient evidence for the jury to find fraud, inasmuch as the de-

defendant could not but know that the representation made by him was false. But there is no case which holds a defendant liable for incorrectly, perhaps, asserting a positive knowledge of that which he believed to be so, and had a moral probability for so believing: and here he vouched the genuineness of his belief, by having credited Miss *Robertson* himself to a considerable amount at the time; for which he took no security till several months afterwards. Then consider what the word *knowledge*, as applied to the subject matter, meant; it could only mean, that the defendant had such strong grounds for believing the fact, as that he himself would for every purpose act upon it as true. If a man could not predicate knowledge of another's wealth, upon such circumstances of reasonable presumption as offered themselves to the defendant's mind, he could upon none: no degree of general credit or visible property would warrant: the credit might be delusive; the party might owe much more; and the visible property might be mortgaged beyond the value. The principle of this action goes to an indefinite extent, if a person were bound, at the peril of answering in damages, to answer truly every question put to him, and that no belief even would excuse the falsehood. Suppose, from error in a man's watch, he tells another, who is subpoenaed as a witness in a cause, that he knows it is 8 when it is 9 o'clock, in consequence of which, the witness, neglecting to appear in time, is called upon his subpoena, and has the costs of the cause to pay upon an attachment; would he have this remedy to recover damages? Where is the line to be drawn? Besides, this case trenches strongly upon the statute of frauds. If a particular phrase will have the operation and effect of making a man liable for the debt or miscarriage of another, it militates as strongly against the meaning and spirit of that act, as if he had used words of direct guarantee or collateral undertaking. The statute was intended to guard against perjuries. - If a mere shift of expression will take the case out of the statute, then persons will be made liable for the debts of others by proving that the defendant used the words "I know him to be worthy of credit," instead of, "I will warrant or engage for his credit," or "I will pay if he do not." And thus all the mischief will be let in which the statute was meant to prevent; namely, the making men liable to collateral responsibility for others by mere words without writing. The form of words cannot be material; the substance and thing is prohibited. At any rate, however, there was no fraud or deceit here, and therefore the defendant is entitled to a new trial.

Lord KENYON, C. J. If there be any doubt in this case, I should wish to have it put in such a shape as to be carried to the dernier resort. But not knowing how that can be done, I shall deliver the opinion which at present I entertain upon the case. Here is a tradesman who has suffered a loss to a large amount in consequence of his having been induced to give credit to a third person: and by this action he calls on the defendant through whose misrepresentation the loss was incurred to make it good. The plaintiff's son knowing nothing at the time of Miss *Robertson*, who had been recommended to the plaintiff by the defendant to buy goods of him in the way of his trade, makes the most particular inquiries concerning her credit, to all which the defendant answers on several occasions in the most positive terms, that she was a trust-worthy person to his own knowledge. The plaintiff's brother, not satisfied with this puts the question, expressly to the defendant, whether he stated this upon hearsay or of his own knowledge, drawing his attention therefore to the subject in the most particular manner; to which the defendant again replies, "*I can positively assure you of my own knowledge that you may credit Miss Robertson to any amount with perfect safety.*" The question then is, Whether that representation were true or false? No doubt it was a gross falsity. She was not a person to be credited with safety, nor had he any knowledge that she was so: and it is a juggle to say that the words in common parlance do not import knowledge in the strict sense of it. They were so understood between the parties at the time, and the plaintiff has suffered a loss in

consequence of it. Soon after I came into this Court the case of *Pasley v. Freeman*, occurred. I had the assistance of three very able Judges to help me to form my judgment; two of whom had long sat on the bench, and were peculiarly conversant with the forms of action, and they were decidedly of opinion that the action lay; though we had the misfortune to differ from the other Judge, with whom I have now the honour to sit on the bench. I indeed was not then so well versed in the critical form of actions; but I had endeavoured to store my mind with established principles; and I had learned that laws were never so well directed as when they were made to enforce religious, moral, and social duties between man and man: and I knew that it was repugnant to all such duties for one man to make false representations to another to induce him to take measures which were injurious to him. That case has been acted upon ever since, and has recently been recognized by another decision of this Court, in which the two Judges who have since taken their seats on the bench concurred. I am not able to distinguish this case from those upon principle. The question has nothing to do with the statute of frauds. That was meant to guard against certain legal presumptions of fraud arising out of contracts, but not to indemnify persons against tortious acts and misrepresentations whereby others are deceived and injured. For a series of years since *Pasley v. Freeman*, cases of this sort have occurred which have passed without dispute. And I have been led to depend on that decision acquiesced in so long, and as I conceived no longer disputed by the learned Judge who differed at first from the rest of the Court. It is said that I imputed no fraud to this defendant at the trial. It is true, that I used no hard words, because the case did not call for them. It was enough to state that the case rested on this, that the defendant affirmed that to be true within his own knowledge which he did not know to be true. This is fraudulent; not perhaps in that sense which affixes the stain of moral turpitude on the mind of the party, but falling within the notion of legal fraud, such as is presumed in all the cases within the statute of frauds. The fraud consists not in the defendant's saying that he believed the matter to be true, or that he had reason so to believe it, but in asserting positively his knowledge of that which he did not know. There are, it is true, some duties of imperfect obligation as they are called, the breach or neglect of which will not subject a party to an action. If I know that one in whose welfare I am interested is about to marry a person of infamous character, or to enter into commercial dealings with an insolvent, it is my duty to warn him; but no action lies if I omit it; but if any one become an actor in deceiving another; if he lead him by any misrepresentations to do acts which are injurious to him; I learn from all religious, moral, and social duties that such an action will lie against him to answer in damages for his acts. And when I am called to point out legal authorities for this opinion, I say that this case stands on the same grounds of law and justice as the others which have been decided in this Court on the same subject. His lordship afterwards added, that as to the want of criminal intention in the party making the false representation, he had learned from Lord *Bacon's* maxims that there was a distinction in that respect between answering *civiliter et criminaliter* for acts injurious to others; in the latter case, the maxim applied, *actus non facit reum nisi mens sit rea*: but it was otherwise in civil actions, where the intent was immaterial if the act done were injurious to another.

GROSE, J. I do not understand the question to be, whether this kind of action be maintainable: on that subject, although I still profess myself unable to comprehend the ground on which the case of *Pasley v. Freeman* was decided, yet I hold myself bound by the authority of it so long as it remains unimpeached by any contrary decision. But I take the question here to be, Whether the evidence prove that which is necessary to sustain the action? which, so far as I understood the arguments and opinion of the court in *Pasley v. Freeman*, was said to be founded in fraud. It was there expressly de-

clared in so many words, that fraud or deceit was the foundation of the action. The only question then is, Whether there were such evidence of fraud in this case as will sustain the action? Now I know not where to find any fraud in the transaction between these parties. I consider what was said by the defendant upon the several occasions, as no more than asserting his opinion of the credit of *Miss Robertson*; an opinion which he seems to have fairly entertained. It is true, that he asserted his own knowledge upon the subject: but consider what the subject matter was of which that knowledge was predicated: it was concerning the credit of another, which is a matter of opinion. When he used those words, therefore, it is plain that he only meant to convey his strong belief of her credit, founded upon the means he had had of forming such an opinion and belief. There is no reason for us to suppose that at the time of making those declarations he meant to tell a lie and mislead the plaintiff. He himself had trusted her before to a considerable amount. He had no reason to know otherwise than what he expressed: and had on the contrary reasonable grounds for asserting knowledge in the sense I understand him to have used it. He had for some time before seen many other persons treat *Miss Robertson* as a person of fortune. He himself saw her living in affluence. He had seen plans of her supposed estate in *Scotland*: and had observed other circumstances, altogether well calculated to delude him. I cannot say that I should not also have been duped by the same appearances. Then it is also a circumstance in the case, that he does not appear to have had any interest in misrepresenting the matter to the plaintiff otherwise than as it really appeared to him. And taking the whole together, I think the evidence goes no further than his asserting, that to his firm belief and conviction she was deserving of credit; and that the defendant was himself a dupe to appearances. But until some case shall be decided which goes further than that of *Pasley v. Freeman*, there must be evidence of fraud to support such an action; and evidence of being a dupe is not sufficient. Therefore, without meddling with the law as laid down in that case, but taking it at present to be right until it is overturned, I cannot concur in this verdict, there being no evidence of fraud as required by that determination.

LAWRENCE, J. Considering the great extent of this question, I wish that it may be put upon the record, in order that it may be submitted to the judgment of a higher Court. I have always understood the doctrine laid down in *Pasley v. Freeman* to be, that without fraud there was no cause of action. I collect that from the opinion delivered by each of the Judges who concurred in that judgment. If this case had gone to the jury on the ground of fraud, I cannot say there would have been no evidence to support the verdict: but the case went to them on the ground, that though the defendant were himself a dupe, yet if the representation made by him were false, he was answerable. Then the question is, Whether if a person assert that he knows such an one to be a person of fortune, and the fact be otherwise, although the party making the assertion believed it to be true, an action will lie to recover damages for an injury sustained in consequence of such misrepresentation? It does not appear that any of the Judges went this length in *Pasley v. Freeman*. Stress has been laid on the defendant's assertion of his own knowledge of the matter: but persons in general are in the habit of speaking in this manner without understanding *knowledge* in the strict sense of the word in which a lawyer would use it. This observation will not only apply to ordinary men in common conversation, but also to persons of the best information. If any man should say that he *knows* there is no city larger than *London*, it must be understood that he is speaking only from information and belief upon such a subject, and not from actual mensuration. The same must be understood when one is speaking of his knowledge of the credit of another. In order to support the action, the representation must be made *malo animo*. It

is not necessary that the party should gain, or intend to gain any thing for himself by it; but if he make it with a malicious intention that another should be injured by it, he shall make compensation in damages. But there must be something more than misapprehension or mistake. However, in deference to the opinion from which I differ, I cannot but state this with doubt and distrust of my own opinion.

LE BLANC, J. I concur with my brothers in wishing to have this question put on the record; but shall give the opinion which I now entertain. The question is, Whether the action be maintainable on a mere representation by the defendant that he knew that of his own knowledge, which in fact he could only be said to know according to the best of his information and belief? Now the law as laid down in *Pasley v. Freeman* went no further than this, that where a party with a design to injure another makes a false representation of a matter inquired of him, in consequence of which the other is damaged, he shall answer in damages. The case of *Eyre v. Dunsford* followed on the same ground. The former case came on upon a motion in arrest of judgment on the third count. That count stated, that the defendant, *intending to deceive and defraud* the plaintiffs, did *wrongfully and deceitfully* encourage and persuade them to sell and deliver certain goods to one *Falch* upon credit; and for that purpose did *falsely, deceitfully and fraudulently* assert that *Falch* was a person safely to be trusted, &c. whereas in truth *Falch* was not then and there a person safely to be trusted, *and the defendant well knew the same, &c.* The question there was, Whether, admitting all those facts to be true, the action were maintainable? All the Judges who were of opinion in the affirmative, thought that there should be damage to the plaintiff, and fraud in the defendant. By *fraud*, I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will towards the other is immaterial. Then the question here is, Whether the defendant's saying that which critically and accurately speaking was not true, but not having said it with any intention to deceive, brings this case within the doctrine of *Pasley v. Freeman*? I think not. Then considering that case to have governed the determination in *Eyre v. Dunsford*, I understand the judgment in the latter to have turned on the fact that the party making the representation, which was not true, was himself to gain something by it; and that the jury were satisfied that the representation was false; and there was sufficient evidence to warrant them in drawing the conclusion that the representation was also fraudulently made. But this is a case where the defendant giving credit to the arts which had been practised upon him and others, and believing the appearances to be real; and not discriminating with a lawyer's mind, conceived that his view of her manner of living, of the plan of the estate, and so forth, amounted to knowledge of what he asserted; and that he did not make the representation upon mere hearsay, and asserted this without any intention to deceive the plaintiff. This, therefore, differs the case essentially from *Pasley v. Freeman*, admitting the law there to have been correctly stated; and I therefore wish it to be again submitted to the jury, and that if any doubt be entertained, the question may be put on the record.

Rule absolute(1)(2).

(1) Vide editor's note to *Vernon v. Keys*, 12 East, 688, where the cases upon the point above decided are collected.

(2) [See note to *Eyre v. Dunsford*, 1 East, 318.—W.]

Shawe v. Felton.

2 East, 109. Nov. 24, 1801.

On an insurance on ship and goods valued at so much, on a voyage to *Africa* and the *West Indies*, the assured is entitled to recover the whole sum on a total loss which happened in the latest period of the voyage; although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. Where a ship insured arrived in port a mere wreck and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterwards she sunk; held that the assured might recover as for a total loss, though her cargo was saved and brought to a profitable market.

THIS was an action on a policy of insurance on the ship *Indian*, and goods, valued at 6600*l.* on a voyage at and from *Liverpool* to the coast of *Africa*, during her stay and trade there, and from thence to her port or ports of discharge, sale and final destination in the *West Indies* and *America*, and until she was moored twenty-four hours in safety. At the trial before Lord *Kenyon*, C. J. at the last sittings at *Guildhall*, it was proved that the ship was seaworthy when she sailed from *Liverpool*; and it was not disputed that the insurers were interested in the ship and outfit, (including provisions and sea stores laid in for the slaves, which were to be taken in on the coast of *Africa*, and also wages advanced to the crew,) to the extent of the value insured. The ship arrived on the coast of *Africa*, took in a cargo of slaves there, and proceeded to *Demerara*. In the course of her voyage thither, and in calm weather, she met with a violent concussion, described to resemble an earthquake, from which she received so much damage, that it was with the greatest difficulty she was kept afloat by pumping until she reached *Demerara*, almost a wreck, where she was obliged to be lashed alongside of a hulk, to keep her from sinking; and in attempting to remove her from thence to the shore, a few days afterwards, she sunk, although the distance was only about fifty yards. At the time of her arrival at *Demerara* her stores were considerably expended. The ship was originally destined there, in the first instance, with directions to the captain to proceed to other ports and places in case he could not dispose of the slaves there at a certain average price. And his letter of instructions from his owners contained the following direction: "As your vessel is not according to the late act of parliament^(a), we would have you sell her in the *West Indies*, provided you can procure 1200*l.*, but expect you will get from 1500*l.* to 1200*l.* Should you not dispose of her, you will procure what freight you can for *Liverpool*." In fact, the vessel having been surveyed at *Demerara*, and condemned as unserviceable, was sold only for 388*l.* In consequence of this the captain was obliged to dispose of all the slaves there, not indeed so advantageously as he might otherwise have done, had he been enabled to proceed to other places: but still so as to cover the average price to which he was limited by his instructions. The plaintiff gave notice of abandonment to the underwriters, and recovered as for a total loss on the ship; and the verdict was taken for the full amount of the sum insured, it being a valued policy.

A rule was obtained, calling on the plaintiff to shew cause why the verdict should not be set aside and a new trial had, on the grounds that the subject matter of the insurance was so much reduced from the original value at the time of the loss, (if it were to be considered as a total loss,) that the sum

(a) This was one of the several acts which passed for the regulation of the *African* slave trade, limiting the number of slaves to the tonnage, and requiring the vessels to be of a certain built. The act alluded to was to take place after the voyage in question commenced.

valued in the policy ought not to conclude the underwriter. That a policy, though valued, was still no more than a contract of indemnity, and was only meant to bind the parties when the subject matter continued nearly in the same state as at first, allowing for usual wear and tear. That in particular it ought not to conclude in this case; because not only the actual worth of the ship was by the owner's own confession of so much less than the stipulated value, but also the stores which were included in the insurance were profitably expended by him in the purchase and sustenance of the slaves, all of whom had been brought to an advantageous market; and therefore, so far from the plaintiff having incurred any loss in this respect for which he was entitled to an indemnity, he was in fact a considerable gainer by the adventure.

The Attorney General, Erskine, Park, and Wood, shewed cause against the rule. It was first attempted at the trial, to shew that the ship was not seaworthy when she sailed; but that failing, it was next insisted that there was not a total loss, inasmuch as the ship was moored above 24 hours at *Demerara* before she sunk; but that also failed; for taking *Demerara* to be in the event her ultimate port of discharge, which only became so because the vessel was not in a condition to proceed further and take the chance of a better market; still it appeared that she was not moored in safety for a moment, but came into the port a wreck, with her death's wound which she received at sea. Now, it is insisted that the policy, though valued, must be opened under the circumstances. But this is contrary to the whole course of proceeding with respect to valued policies. It is not pretended that the property insured was over-valued in the first instance, but that by wear and tear and the consumption of provisions and ship's stores, which were covered by the policy, the value had been reduced. If this were admitted, it would take away all certainty, not only from valued, but from open policies; for every day's continuance of the voyage must reduce the value in these respects. It happens, indeed, in the present instance, that the object of the voyage was not defeated, because the slaves were preserved: but this is an insurance on the ship and stores, and the same objection would have applied if the ship had sunk at sea, near to the same port, and all on board had perished. It might still have been said, that at the time the loss actually happened, there was the same diminution in the actual value of the property insured. Besides, the lowest sum for which the ship was directed to be sold is no criterion of the value; for the owner could no longer make use of her for the purpose for which she was originally built, and therefore it was more advantageous to him to dispose of her at once, even at a loss. At any rate, this being a valued policy, for which the underwriter receives an adequate premium, he is concluded from an examination into the value at any subsequent period of the voyage, no fraud being imputed to the plaintiff in the first instance. The custom of making valued policies arose soon after the stat. 19 Geo. 2. c. 37(a). *Magens*, Mag. 1 vol. 35, on *Insurance*, which was first published here in 1755, nine years after the statute, treats it as a settled custom. In *Le Cras v. Hughes*(b), Lord Mansfield said, "The constant usage since the stat. 19 Geo. 2., in case of a total loss, has been to let the valuation stand, and the parties are estopped from altering it: but an average loss opens the policy. I will give you the origin of this custom: it was in a case of *Erasmus v. Banks*, Mich. 21 Geo. 2, where Lord C. J. Lee said, *Valuation at the sum insured is an estoppel in case of a total loss, but not so in case of an average loss only*. On the 13th December 1747, the same point came again before the court in *Smith v. Flezney*, and

(a) This was to prohibit wagering policies, "interest or no interest, or with out further proof of interest than the policy."

(b) E. 22 Geo. 3. vide S. C. *Parke on Insurance*.

was so determined." Lord *Mansfield* then proceeded to observe, that it was a reasonable usage, and ought to be the rule.

Gibbs and *Cassels*, in support of this rule, admitted that a valued policy was not to be opened unless there were fraud, where the thing valued was the thing lost: but they contended that here the subject matter of the valuation was not the subject of the loss. Admitting that the vessel with her outfit was worth 6600*l.* when the insurance was made; yet as a great proportion of that value, to the amount of above 3000*l.*, consisted in those stores and provisions, out of which the profit of the voyage was to arise by the expenditure of them, and as in fact the slaves who were purchased and sustained out of that expenditure all arrived safe, and produced the profit of the voyage, the subject matter of the insurance, as to so much, was not lost to the plaintiff, but arrived at the place of its destination, and has been received by him in the shape of profit upon the voyage. The same observation would apply to another sum of about 400*l.* paid in advance of the seamen's wages at *Liverpool*. At any rate, there is no instance in the books of a total loss, where the object of the voyage was accomplished, and the subject matter of the insurance arrived in specie at the place of destination. It is, therefore, an attempt to call upon the underwriters for an indemnity to the amount of 6600*l.*, when upon the plaintiff's own shewing, he has not been damaged to a sixth of the amount; and is nothing less than a wagering policy, within the prohibition of the statute.

Lord *KENYON*, C. J. The jury had no doubt but that the ship was seaworthy when she sailed, and that there was a total loss; for though she arrived at *Demerara*, she was never moored twenty-four hours, nor a moment in safety. She came there a perfect wreck, having received her death's wound at sea, and was with the utmost difficulty kept afloat till all the people on board were landed. It is not pretended now that there was any fraud in the case: but it is contended that the underwriter is not bound by the valuation in the policy. It is of little consequence to inquire what my opinion would have been upon the subject of valued policies in the year 1746, immediately after the stat. of the 19 Geo. 2, passed: for very soon after they were decided to be legal by as cautious, and upright, and pains-taking a judge as ever presided in this court (Lord C. J. *Lee*.) He was succeeded by Sir *Dudley Ryder*, and this latter by Lord *Mansfield*; and during all this period such policies have been sanctioned by one uniform course of decisions. All this is now supposed to be wrong; and the rules by which this and other commercial nations have so long regulated their dealings is now wished to be disturbed; but I will not lend my aid to open such a new and wide door of litigation, much exceeding every thing that has gone before. If we were to enter into the calculations which have been contended for, every valued policy would be to be opened. Every man's meal on board a ship would take from the value of the original outfit. Is this to be endured? Will good faith admit of it? Where is the line to be drawn between a greater or less diminution of the value? Therefore, as the rule and practice of valued policies have been acted upon and sanctioned since the passing of the statute, I am not one who wish *quæta movere*.

GROSE, J. We are desired by this motion to open a valued policy, contrary to the practice, and in a case where no fraud is imputed; for doing which no authority has been cited. If we were to admit it in this instance, it would be required in every other; and thus a door would be opened to endless litigation. Therefore, to avoid great injustice to individuals, and great public inconvenience, I think we are bound to refuse the application.

LAWRENCE, J. As to the practice of binding parties as to the amount of their interest by valued policies has obtained ever since the stat. of Geo. 2, it would require very strong reasons to shew that it is wrong. That statute was passed in order to prohibit mere wagering policies by persons insuring who had no interest in the thing insured, and therefore it avoids policies made,

interest or no interest, or without further proof of interest than the policy itself. The effect, therefore, of a valued policy is not to conclude the underwriter from shewing that the assured had no interest, and that in fact it was a mere wagering policy within the statute; but in order to avoid disputes as to the quantum of the assured's interest, the parties agree that it shall be estimated at a certain value. Here it is not pretended that the subject matter of the insurance was not at first of the value estimated in the policy. Then how does this differ from the case of an open policy in this respect? Would it not be sufficient for the assured in an open policy to prove that at the time the ship sailed the subject matter of the insurance was of such a value? Is not that the period to look to, and not the state of the thing at the time of the total loss happening? If on account of the peculiar nature of an *African* voyage there ought to be a difference in this respect between these and other trading adventures, the underwriters may, if they please, introduce a special clause in the policy to provide for the diminution in value by the expenditure of stores and provisions in the purchase and sustaining of the slaves. As it stands at present, there appears no ground for making any such distinction.

LE BLANC, J. The present is an extreme case, because the loss happened at the last period of the voyage at which it could happen. But the same thing must occur more or less in every policy upon ship and outfit. The value of the property must be continually diminishing, and if the loss happen at the latter end of a long voyage, no doubt the property must be considerably deteriorated at the time by the usual wear and tear: and yet it is never objected that the underwriter is not liable for the original value. As to the owner himself having estimated the value of the property at so much less than the sum at which it was insured, many things may happen to render a vessel of less value when the voyage is concluded, although the subject matter exists; the amount of the repairs required, &c. The rule having been so long laid down as to valued policies, it is too late to open it again⁽¹⁾⁽²⁾.
Rule discharged.

Neate and others, Assignees of Sandwell a Bankrupt v. Ball and others.

2 East, 117. Nov. 24, 1801.

A trader orders bags of wool of defendants (merchants) in *December*, which are delivered on the 19th of *February* following, and by the course of dealing the trader has the option of returning the wool for which he has no call, though previously ordered. The trader being from home when the bags were delivered, on his return the same day gives directions not to have them opened or entered in his books, but only weighed off to see that they agreed with the invoice; he being then in embarrassed circumstances, and intending not to take them into the account of his stock if in the event he found himself unable to pursue his business. Afterwards on the 4th and 5th of *March*, being then avowedly insolvent, he returns the bags with a letter to the merchants declaring his situation, and hoping that they will have no objection to take back the wool, and requesting the favour of a line of approbation thereof; which letter is received and the approbation given after an act of bankruptcy committed on the same day the letter was sent. Held that by the trader keeping possession of the goods so long, his option (which ought to have been exercised on the receipt of them) was gone; and that being in a state of insolvency and on the eve of bankruptcy, he could not exercise the power of restoring the goods to the vendors, though without any fraudulent concert with them: but that the trader's assignees are entitled to the property.

IN trover for certain bags of wool, it appeared that the defendants were *Spanish* wool merchants in *Bristol*, with whom *Sandwell* had before his

(1) Vide *Marshall v. Parker*, 2 Campb. 69.

(2) [See 2 Phillips] on Ins. p. 1, &c. ch. 14, s. 1, where the case in the text is cited and remarked upon, and a successful effort is made to shew by an examination of both the American and English cases, that where there is no fraud, the valuation in the policy is equally

bankruptcy been in the habit of dealing for that commodity. The course of dealing between them was, that sometimes *Sandwell* ordered the wools, so that sometimes they were sent by the defendants to him without any specific order; but they always gave him the option of returning the goods if he had no call for them; though previous to the transaction in question none had ever been in fact returned. In the present instance, an order for 13 bags of wool had been given in *December* 1800, which were directed by *Sandwell* to be sent from *Southampton* (where they were deposited with the defendant's agent) to *Devizes*, where *Sandwell* lived, about the middle of *February*. The defendants sent him the invoice sometime in *January*; and on the 14th of *February* the bags were sent. *Sandwell* was not at home when they arrived and were deposited in his warehouse; but on his return home the same day he gave orders not to have the bags opened, and they were not in fact opened; but he gave the invoice to his foreman, and directed him to weigh off and examine the wools therewith: and they were in fact deposited along with other goods of the bankrupt. On the 4th of *March*, *Sandwell* wrote the letter aftermentioned to the defendant, and on the same day delivered four of the bags to a common carrier to take back to the defendants, (who received them on the 6th; and on the 5th, *Sandwell* delivered the remaining nine bags at the same carrier's warehouse with the same direction, and wrote another letter to the defendants as after-mentioned. The first letter from *Sandwell* to the defendants, dated "*Devizes*, 4th *March* 1801," was as follows: "I am sorry to be under the necessity of returning the wool I lately received from you. I cannot take it to account. The bearer will deliver you four bags, and tomorrow the remainder shall go. I will write you per post," &c. In the second letter dated "*Devizes*, 5th *March* 1801, *Sandwell* wrote to the defendants "Trade being so bad at this time as to make it doubtful whether I can pursue it with any advantage, and having met with some losses, which quite dispirit me, I have taken the liberty of returning you by a cart this morning four bags of the thirteen you lately sent me, and have deposited the remaining nine bags in the house of *F.* the carrier for your use. I have never taken these wools into my stock, and therefore hope you will have no objection to receive them; and inclosed I send you the invoice. Be so good as to favour me with a line of approbation hereof, &c. P. S. I happened to be from home when the wools were brought, otherwise I should not have taken them into my house." In reply to these letters, the defendants, on the 7th of *March*, wrote *Sandwell* a letter, signifying the receipt of his letter and of the four bags of wool which they had credited to his account, as they would the remaining nine bags when received. The bankrupt himself deposed, that at the time of his returning the wools he had not a bankruptcy in contemplation: but that his affairs were in an embarrassed state, and he was sensible that he was insolvent, but was undecided whether he should call his creditors together or not. That if he had been at home when the wools arrived he should not have received them, being then embarrassed, and having had orders countermanded, which he had expected to execute when they were ordered from the defendants: and that he thought it hard and unjust to the defendants to take the goods: and that he had a right to return them at his option: and that he did not take them into the account of his stock. That after returning the wools he made one or two payments, but found himself unable to pay any other demands. He was denied to a creditor on the evening of the 5th of *March* after the remainder of the goods had been sent to the carriers; and on the 6th he left his house.

The action was brought by the plaintiffs, as assignees under the commission

binding on the parties in the case of a partial or average, as of a total loss. Of course, the valuation, in either case, does not preclude the enquiry, whether or not the interest valued was put at risk. See also *Forbes v. Aspinwall*, 13 East, 823.—W.]

of bankrupt issued against him, to recover the four bags which the defendants had received; it being agreed that the other nine bags, which were delivered to the carrier and never forwarded to the defendants, should abide the event of this cause. A verdict was found for the plaintiffs at the trial before Lord Kenyon, C. J. at the sittings after last *Trinity* term at *Guildhall*; and a rule was obtained, principally on the authority of *Atkin v. Barwick*(a), calling on the plaintiffs to shew cause why there should not be a new trial. Against which

The Attorney-General and *Hovell* now shewed cause. Whatever the bankrupt's intentions might have been from the time the goods first came to his possession until he returned them, or however he might have refused them if he had been at home when they arrived; yet the goods having been in fact deposited in his warehouse, and he having acquiesced in that from the 19th of *February* till the 4th of *March*, and the goods having been weighed off, and mixed with his other property during all that time, the delivery to him was complete, and the property became absolutely vested in him; so that it was not competent to him, in a state of insolvency, and at the very eve of bankruptcy, to rescind the contract and restore the goods to the defendants. During all the time the goods formed part of his visible stock in trade, upon which he gained credit; and the circumstance of his having given orders not to have them opened cannot vary the question; because that could not be known to the world at large; and such an exception would be repugnant to the principle of the bankrupt laws. The case of *Atkin v. Barwick*, if it be law, is at any rate distinguishable from the present; for a much longer period intervened between the return of the goods, which was on the 18th of *May*, and the bankruptcy, which was not till the 9th of *June*. But what is more material is the explanation of that case given by Lord Mansfield in *Harman v. Fishar*, Cowp. 125, and *Alderson v. Temple*, 4 Burr. 2239, and since adopted by Lord Kenyon in *Barnes v. Freeland*, 6 Term Rep. 85, that the trader refused to accept the goods, and returned them; and that though the judgment might be sustained, the reasons were wrong. Perhaps the better way would be to deny the case to be law altogether; for it seems difficult to say that the goods had not been accepted; and if so, the authority of it is much trencched upon by all the later decisions. With respect to the case of *Salte v. Field*, 5 Term Rep. 211, where the return of the goods was sustained, the principal actually disaffirmed by letter the contract made by his agent before the delivery of the goods, although the letter was not received till after the delivery to the vendee's packer, in whose hands the goods were attached by the creditors. And though the other party was at liberty to have refused the renunciation of the contract entered into by an authorised agent; yet having accepted it, the countermand related back antecedent to the delivery itself. But where, as in *Smith v. Field*, lb. 422, the vendor under the same circumstances elected not to rescind the contract, by admitting the goods in the bankrupt's hands, as the property of the vendee, it was ruled that the assignment of the latter who became a bankrupt, were entitled to retain the goods.

Erskine, *Gibbs*, and *Scarlet*, contra. The honesty of the case on the part of the bankrupt, as well as of the defendants, cannot be impeached; and unless *Atkin v. Barwick* be denied to be law, this case is also supported by positive authority. In none of the cases is the authority of that judgment disputed, but only the reasons which were given for it. On the contrary, in *Harman v. Fishar*, Cowp. 125, Lord Mansfield expressly says, that the judgment in *Atkin v. Barwick* was right: and it was also supported in *Salte v. Field*, 5 Term Rep. 211, and *Smith v. Field*, 5 Term Rep. 422. But the account given of the same case in *Barnes v. Freeland*, 6 Term Rep. 85, is not accurately stat-

(a) 1 Stra. 165. The same case is reported in *Fortesc.* 353, 10 Mod. 481, and 12 Mod. 295.

ed : for it could not be said, (as is supposed in the report) that the goods there had not been *accepted* by the vendee. For they were sent on the 7th of *April*, and not returned till the 18th of *May*; and it cannot be taken that they were upon the road during all that interval^(a). Here there never was a complete sale and delivery of the goods. By the usual course of dealing between these parties *Sandwell* was at liberty to return any goods even after delivery in fact, which he found he had no occasion for. And though the goods were in fact deposited in his warehouse, yet that being without his consent could not take away his election. He was from home at the time of the deposit; but as soon as he returned he did as much as in him lay to repudiate the delivery, by declaring his dissent to it, and giving directions not to open the bags nor enter them in his stock. The weighing them off was to guard against any mistake in the invoice, for which he might become responsible though the goods were returned. It is true, he did not immediately inform the defendants that he had elected not to take the goods; but supposing they had remained with the carrier, the option would have continued open to him till the defendants themselves chose to recall the goods: then the fact of their having been deposited in his own warehouse, without his knowledge, and against his will, cannot vary the case. If he still retained the option of returning them without the particular leave of the defendants, the legal consequence must be the same, and cannot be altered by the insolvency of the party. In all the other cases relied on *e contra* there was an absolute acceptance of the goods; the vendee had not the power of rescinding the contract without the assent of the vendor, even supposing the former had continued solvent; then by the operation of the bankrupt laws he ceased to have the power of doing so in a state of insolvency, or in contemplation of bankruptcy. It is not necessary to decide here whether *Sandwell* could have exercised the option reserved to him after the act of bankruptcy; because it might be said, that by the operation of the bankrupt laws all property was divested out of him by relation back to that time; but it is enough that the election was exercised before the bankruptcy, while the legal as well as equitable property continued in him; there being no fraudulent intent here to prefer one creditor to the rest in contemplation of bankruptcy. If his permitting the bags to remain in his warehouse were evidence of an acceptance on his part, at least it is explained to be a qualified acceptance, and such as reserved to him the original option which he had of returning the goods, if he found he had no occasion for them.

Lord KENYON, C. J. If in these cases where goods continue in bulk, and discernable from the general mass of the trader's property at the time of a bankruptcy, they could be returned to the original owners who had received no compensation for them; without injury to the claims of others, it would be much to be wished; but that cannot be done without breaking in upon the whole system of the bankrupt laws. This case was tried upon the evidence of the bankrupt and his servants; and it was very evident that they wished to favour the defendant in the transaction. The jury were told by me, that if the goods were not delivered to and accepted by the bankrupt there was an end of the question, and the property remained in the consignors; but if otherwise, the bankrupt had no power to rescind the contract when he returned them: upon this they found for the plaintiffs. The verdict is now moved to be set aside on the authority of *Atkin v. Barwick*, which is contended to be in point for the defendants. Certainly the cases do approach each other a little: but of that case I must observe, that I never heard it quoted without some comment upon the law of it. Each gentleman at the bar finds fault with it in

(a) This fact, which seems an important one, is not clearly stated in the report in *Strange*: But it is not very improbable that the goods might have lingered so long on the road between *London* and *Penryns* as to have been returned within the period mentioned on the first convenient opportunity after they were received; so as to justify the explanation of the case as it has been frequently given from the Bench.

his turn. In my opinion Lord *Mansfield* has extracted the true ground on which that judgment, if it did not proceed, ought to have proceeded; namely, that the trader, finding himself in a failing condition very honestly did not accept the goods, but returned them. And if the goods were not accepted, the judgment was right. Cases are to be resorted to for the sake of the principle on which they were decided, and our opinions ought not to be governed by every little matter of difference which may be pointed out. Then see what this case is, as applicable to the principle which governs in such cases. Did the bankrupt accept the goods? In considering that question never let it be forgotten, that the bankrupt lived at *Devizes* and the defendants at *Bristol*, between which places there is not only daily, but it may almost be said, hourly, intercourse. That on the 19th of *February*, the goods came into the custody of the bankrupt, on which day he, doubting his own situation, and meaning in case he could not avoid the insolvency which threatened him to do what was right by the defendants, wished to keep matters in such a state that he might have it in his own power to dispose of the goods in what manner he pleased according to the event. That might be well meant in him: but it is what the law cannot permit. He was to decide immediately whether he would accept or return the goods. But see what he did. He received them on the 19th of *February* into his warehouse, and there he kept them as his goods, till the 4th and 5th of *March*. If he had continued solvent, and the defendants had refused to receive them back after such an interval, it would have been asked by them whether he was at liberty to keep them for fourteen days, without giving any notice that he did not choose to accept them, in order to take advantage of the rise or fall of the market. However, he makes the discovery on the 4th of *March*, that he has no occasion for the goods; and on the 5th, he writes the letter which has been read; knowing at the very time that he was insolvent, and ordering himself to be denied to a creditor in the evening of the 5th. Morally speaking, I do not blame him for what he wished to do: but by law he could not do it. The power of conferring favours, however well merited, was out of his hands at the time. It might as well be contended that he had an option to return the goods even after the act of bankruptcy. Then see again when the defendants agreed to this; not till the 7th of *March*, which was after the act of bankruptcy, when the bankrupt was incompetent to make any bargain concerning the goods. Till the re-delivery on the 7th the goods must be considered as continuing in the hands of the bankrupt, because they were in the custody of the carrier who was his agent for the purpose. I will not say that the case of *Atkin v. Barwick* was wrongly decided: I leave it to others to consider that point: but Lord *Mansfield* has given a ground on which the Judges there went, or ought to have gone, in deciding it. I think we disturb no case by our present opinions, but we preserve the system of the bankrupt laws unimpaired in deciding with the plaintiffs.

GROSE, J. The only ground to support the judgment in *Atkin v. Barwick* was what Lord *Mansfield* stated it to be in the subsequent case of *Harman v. Fishar*, namely, that there had been no acceptance of the goods by the trader. The principal question then here is, Whether the goods were accepted by the bankrupt or not? for if they were, he was insolvent on the 4th and 5th of *March* when they were returned, and therefore was not then in a capacity to rescind the contract. Now all the evidence shews an acceptance, and it is so found by the verdict.

LAWRENCE, J. The great argument for the defendants has rested on the ground that the bankrupt had an election to return the goods continuing down to the time of his bankruptcy, and that the property did not vest in him until he had made his election. But the letter alluded to contradicts that idea; for it is a solicitation to the defendants to receive back the goods, for the reasons which he assigns touching his own situation. It is true, the bankrupt was

not at home when the goods were first brought to his house in *February*; but that cannot make any difference in this case; for if he did not choose to accept them after his return home, he had nothing more to do than to write to the defendants to that effect. He might have said that he was not bound to accept them, and therefore he returned them. Instead of which he kept them till the 4th and 5th of *March*, and then wrote to the defendants, not as if insisting that he was not bound to accept them, but *hoping that they would have no objections to receive them* and requesting the favour of a line of *approbation thereof*. That is inconsistent with the ground of defence now set up.

LE BLANC, J. The question is, Whether the property of the goods were vested in the bankrupt? The facts decide the case. For supposing, by the course of dealing, that he had an option to return the goods, which had been sent by his order, yet he has not done so. When he knew the goods were in his house, instead of returning them to the defendants, he kept them in his warehouse, where they had been deposited. And it would be opening a door to great fraud on the bankrupt laws, if we were to hold that the vesting or not vesting of the property of goods sent to a trader, depended upon whether or not he entered them in his books as part of his stock. How long shall he be allowed to keep them in his possession without making such entry? Certainly when the bankrupt wrote the letter which has been referred to, he considered that he had before accepted the goods. Therefore, my opinion is formed on this, that the bankrupt had taken the goods into his possession; and that when he returned them he was not at liberty so to do.

Rule discharged.

Yate v. Willan.

2 East, 128. Nov. 25, 1801.

The payment of money into court upon a count stating a special contract is an admission of such contract, and narrows the inquiry to the quantum of damages sustained by the breach thereof. Therefore if the plaintiff declare as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays 5*l.* into court, the latter cannot give in evidence that the contract was that he should not be answerable for goods lost to a great or value than 5*l.* unless entered and paid for accordingly: though if no money had been paid into court, the plaintiff must have been nonsuited on such evidence.

THE plaintiff declared against the defendant as the owner and proprietor of a certain coach called the *London and Shrewsbury* mail coach, for the carriage of passengers and goods for hire, between *London and Shrewsbury*, and intermediate places. That the plaintiff for a certain hire had taken and hired a place in the coach as an inside passenger, to go from the *Green man and still* in *Oxford-street* to *Oxford*, being an intermediate place, &c. and as such passenger, was entitled and was about to carry with him, in and by the said coach, a certain travelling trunk, containing divers articles, &c. of the value of 30*l.* And thereupon, in consideration that the plaintiff, at the instance and request of the defendant, would forbear to carry with him the said trunk as such passenger, as aforesaid, the defendant undertook and promised the plaintiff that he would take care of the trunk, and safely send and forward the same by the next night's mail coach to *Oxford*, and there deliver the same to the plaintiff. That the plaintiff confiding in the said promise did forbear to carry the trunk with him as such passenger, &c. whereof the defendant had notice. But that though the defendant, as such owner, &c. had and received the said trunk for the purpose of taking care of and forwarding the same, as aforesaid, &c. and causing the same to be safely delivered to the plaintiff at *Oxford*: yet not regarding his said promise and undertaking, &c.

the defendant so carelessly and negligently conducted himself about the conveyance of the said trunk, that the same was lost, &c. There were two other special counts, (one charging the defendant as a common carrier,) in substance the same, and a fourth count for money had and received. The defendant pleaded the general issue, and paid 5*l.* into court upon the three special counts.

At the trial before *Lawrence, J.* at *Oxford*, it was proved on the part of the plaintiff, that the defendant had paid 5*l.* into court on the special counts, and that the value of the trunk was 20*l.* and there the plaintiff rested his case, contending that the payment of money into Court on those counts was an admission of the contract as there laid, and concluded the defendant from disputing it. This was resisted on the part of the defendant; and the learned judge, reserving the point, permitted the latter to go into proof of his defence; when it appeared that the plaintiff had not previously taken any place in the mail, but waited at the *Green man and still*, in *Oxford-street*, for the coming of the coach, intending to proceed by it if there were room for him. He accordingly obtained a vacant place; but there not being room for his luggage, it was agreed that it should be sent by the next day's mail, according to the directions which the defendant gave. But no account was given what had become of the trunk. It was also proved, that there was stuck up, in large letters, upon a board in the coach-office where the defendant was before he took his departure, a notice, (such as is usual in these cases,) purporting that the proprietors of the carriage would not be responsible for more than 5*l.* for any species of property contained in any article lost or damaged, unless the same were booked and paid for according to the value; on the present occasion the plaintiff paid 2*d.* for the booking; but nothing was paid for the carriage. A verdict was taken for the plaintiff for 15*l.* besides the 5*l.* paid into Court: and it was agreed, that if the Court should be of opinion, that the contract was not admitted by the payment of money into Court on the special counts, then a verdict should be entered for the defendant. A rule nisi having been accordingly obtained for entering a verdict for the defendant,

Milles, Abbot and Taunton shewed cause against it. The rule for paying money into court was made for the benefit of a defendant. If the declaration consist but of one count, he knows whether the contract be therein truly stated, and how to apply his defence. If he dispute the contract itself declared upon, he must do so upon his plea. If he admit the contract, but only dispute the quantum of the damage, he may pay into Court so much as he admits to be due, and deny the rest by his plea. The same observation applies where there are several counts; the defendant may select to pay money into Court upon either, which will not conclude him from denying the contract stated in the rest: otherwise, if he pay money into Court generally; for that refers to all the counts. But from the very nature of the thing, the payment of money into Court upon any particular count must amount to an admission of the truth of the contract therein stated; for unless it be truly stated, nothing can be due upon it. It therefore leaves nothing in dispute but the quantum: and it throws the hazard upon the plaintiff of shewing that more is due, if he proceed in the action. Where money is thus paid the plaintiff is thrown off his guard, and does not go prepared to prove the contract at the trial, but only the amount of the damages which are disputed. Then the evidence offered at the trial by the defendant was inadmissible, because it goes to vary the contract as laid; it shews that the contract was not general to carry for him as the plaintiff alleges, but a limited and qualified undertaking to be answerable for 5*l.* and no more. The cases of *Cox v. Parry*, 1 Term Rep. 464. *Watkins v. Towers*, 2 Term Rep. 275, *Hutton v. Bolton*,^(a) and *Gutteridge v. Smith*, 2 H. Blac. 299, all shew the payment of money into Court is an ad-

(a) E. 22 Geo. 3 B. R. cited in *Clay v. Willan*, 1 H. Blac. 299.

mission of the contract in the count on which it is so paid : though, as in the first-mentioned case, if the contract itself be illegal, the Court will not permit the plaintiff to recover beyond the amount of what has been paid in ; because they will not give effect to an illegal contract, though the defendant admit that he entered into it.

Williams, Serjt., *Manley* and *Bedford*, in support of the rule. Admitting that the payment of money into Court is an acknowledgment of the cause of action stated in the counts on which it is paid in ; yet that does not conclude the defence made in this case, which is distinguishable from all those cited. The evidence offered did not go to *vary* the contract declared on ; it admits the undertaking to carry ; but like the case of a valued policy, it is tantamount to an admission on the part of the plaintiff, that the value of the trunk did not exceed 5*l.*, not having been entered and paid for as such. [Lord *Kenyon* observed, that in valued policies the plaintiff declared on them as such.] In *Gutteridge v. Smith*, though the payment of money into Court on a count on a bill of exchange was ruled to be an admission of the defendant's hand-writing to such bill ; yet it was not holden to be an admission that the whole bill was due : and in such case no doubt evidence of an acknowledgment by the plaintiff, that only a certain part was due, would be received. *Cox v. Parry* went still further ; for though the contract was admitted, yet the plaintiff was holden not to be concluded by such payment of money from disputing the legality of it beyond the amount of the sum paid in. In *Gutteridge v. Smith*, only three judges were in court, and one of them differed from the others. In *Hutton v. Bolton*, though the damages laid were above 20*l.*, yet the Court permitted the carrier to pay that sum into Court, which was the extent of what he had advertised to bear ; for the purpose, as they said, of saving his costs : and yet that would have been nugatory if he thereby admitted the truth of the whole contract stated, which included a larger sum. Here the defendant was obliged to pay the 5*l.* into Court, which he had engaged to answer for ; otherwise there must have been a verdict against him to that amount.

LORD KENYON, C. J. The latter argument proceeds upon a mistake : the payment of money into court on a special count admits the contract as there laid, but leaves the amount of the damages incurred by the breach of it open to dispute. One is always sorry when the real justice of the case is eluded by any trick or mistake ; but the court can only look at the record, and apply the evidence to that. This case, both upon principle and precedent, is so clear, that it is impossible to raise a doubt, if I can but express my ideas upon it as clearly as I conceive them in my own mind. The plaintiff states in several counts the several demands which he has upon the defendant. The latter says, true it is, you have a demand upon me, arising upon the several contracts stated in the first, second, and third counts ; but admitting that I am liable to pay you something upon those contracts, yet it is not so much as you claim, but only 5*l.* But as to the other demand I owe you nothing. The plaintiff does not agree to this, and the parties come to trial to have it ascertained, whether more than that sum is due upon those special contracts. If the defendant had denied all, the plaintiff must have proved all : but as to such counts, where he admits the contracts, but only disputes the quantum of the damage, the plaintiff only comes prepared to prove the amount beyond the 5*l.* paid into Court. At the trial the defendant changes his ground and says, that the plaintiff has no right to recover beyond the 5*l.*, because the contract entered into was not what is stated by him in his declaration, but a different contract. To which the plain answer is ; that he should not then have admitted that the plaintiff had any such demand as he states, but should have disputed the contract altogether. And then if he had shewn that it was not a general agreement to be answerable for the value of the goods lost or damaged, but a special limited agreement to be answerable for no more than 5*l.*

value, unless it were entered and paid for accordingly, the plaintiff must have been nonsuited; for such a defence would have negatived the contracts stated in the declaration.

GROSE, J. It is too late now to say, that the payment of money into Court is not an admission of the contract as stated in the count on which it is so paid. In this case it admits the general agreement declared on to be answerable for the safe carriage of the goods; whereas the real defence is, that the defendant did not make a general but a particular and limited agreement to be answerable: and therefore, if the defendant had denied it altogether, the plaintiff must upon this evidence have been nonsuited.

LAWRENCE, J. The plaintiff states a certain agreement, and by the payment of money upon the contract stated the defendant admits that he did so contract, but contends that he is not liable for more than 5*l.* damages under that contract. The admission can refer to nothing else. He admits, (as Mr. Justice *Ashhurst* says in giving the judgment of the Court in *Cox v. Parry*, 1 Term Rep. 464, that the plaintiff had a right to maintain the action, and reduces the question simply to the quantum of damages he is entitled to recover. The residue of that case is no more than this, that if the contract declared upon be illegal, the defendant shall not give it effect by his admission; because no admission of the parties can conclude the Court to make them give effect to an illegal contract. It is said, that if the 5*l.* had not been paid into Court, the plaintiff must have recovered to that amount. But that is not so; for upon this evidence it would have appeared that the defendant had not contracted in the general manner in which the plaintiff has declared, but had only made a limited contract; and therefore the plaintiff must have been nonsuited. If this wanted authority, it is supported by *Clay v. Willan*, 1 H. Blac. 298; for there the Court held, that the plaintiff was not entitled to recover even the 5*l.*, the contract being special, and not general. So in *Pigott v. Dunn*, E. 36 Geo. 3, B. R., which was an action against a carrier, where no money was paid into Court; the goods lost were above 5*l.* value, but had not been entered and paid for as such. The plaintiff contended, that she was at all events entitled to recover the 5*l.*, but the Court ruled otherwise.

LE BLANC, J. In the case of *Hutton v. Bolton* the Court did not look to the consequences of paying the money into Court. The defendant there had applied for leave to do so, which the plaintiff objected to. But the Court admitted it to be done, without deciding what effect it might have. Here the plaintiff declares specially on a general contract to carry the goods for hire. The defendant denies that he made such an undertaking, and contends it was only a limited contract under certain restrictions. Therefore, upon the general issue the evidence would have negatived the contract declared on, and the plaintiff must have been nonsuited: but by the payment of money into Court on the special counts, he has admitted the contract to be as there laid.

Rule discharged(1).

(1) Vide *Clark v. Gray & al.*, 6 East 564. 571, where this case is explained and limited. The cases relating to payment of money into Court are collected in the editor's note to *Arden v. Palgrave*, 9 East 326.

Whitborn v. Evans.

2 East, 185. Nov. 28, 1801.

By s. 1. of stat. 39 & 40 Geo. 3, c. 104, the jurisdiction of the Court of Requests in London is enlarged from debts of 40s. to 5l. from the 30th Sept. 1800, and by s. 12. if any action shall be commenced in any other Court to recover any debt not exceeding 5l. within the jurisdiction, the plaintiff shall not recover any costs, &c. held that the words "*shall be commenced*," must by necessary construction be restrained to the date of the 30th September, and not to the passing of the act, which was on the 9th of July preceding.

THIS was an action for goods sold and delivered, and on the money counts. At the trial before Lord Kenyon, C. J. at the last Sittings at Guildhall, the plaintiff recovered a verdict for 4l. 15s., and the question was, whether he were entitled to costs upon the stat. 39 & 40 Geo. 3, c. 104(a), the cause of action arising within the jurisdiction of the Court of Requests in London. By s. 12 of that statute, "If any action or suit shall be commenced in any other court than the said Court of Requests, for any debt not exceeding 5l. and recoverable by virtue of the said recited acts, (i. e. 3 Jac. 1. c. 15, and 14 Geo. 2, c. 10, which limited the jurisdiction to debts not exceeding 40s.) and of this act, or any of them in the said Court of Requests, then the plaintiff in such action shall not by reason of a verdict for him, or otherwise, be entitled to any costs whatsoever," &c. By s. 1. of the acts, so much of the recited act as restrains the jurisdiction of the Court of Requests to debts not exceeding 40s. shall, from September 30th 1800, be repealed. Here the action was commenced before the 30th, (viz. on the 24th of September 1800,) but after the 9th of July, when the act received the royal assent.

Garrow shewed cause against a rule for taxing the plaintiff his full costs, on the ground that the words of the 12th clause, that if any action "*shall be commenced*," &c. must refer to the passing of the act, which was on the 9th of July prior to the commencement of this action; and therefore the plaintiff having recovered less than 5l. was not entitled to costs. But

Lord KENYON, C. J. was clearly of a different opinion. The whole act must be construed together, otherwise the greatest injustice would ensue; for there would be an interval between the 9th of July and the 30th of September within which the subject would be without any adequate remedy. Till the latter period he could not have recovered in the Court of Requests, the demand being above 40s.: therefore he had no other remedy than to sue in the superior courts.

Mingay in support of the rule.

Per Curiam,

Rule absolute.

REGULA GENERALIS, M. 42 GEO. 3.

IT IS ORDERED, that from and after the first day of Hilary term next, no judgment be signed upon any warrant authorizing any attorney to confess judgment, without such warrant being delivered to, and filled by the clerk of the dockets; who is hereby ordered to file the same in the order in which they shall be received.

And it is further ordered, that every attorney of this court, who shall prepare any warrant of attorney to confess any judgment, which is to be subject to any defeasance, do cause such defeasance to be written on the same paper or parchment, on which the warrant of attorney shall be written; or cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeasance.

CASES

IN

HILARY TERM,

IN THE FORTY-SECOND YEAR OF THE REIGN OF GEORGE III.

Ex parte Michell, Clerk.

2 East, 187. Jan. 26, 1802.

An annuity secured on lands in fee of equal annual value need not be registered under the stat. 17 Geo. 3. c. 26. s. 8, though the annuity were also secured upon leasehold property. A memorial of an annuity, stating the whole consideration to have been paid in money, is good, though part of it were paid by means of a banker's check, the value of which had been actually received by the grantor some time before the execution of the deeds.

A RULE was obtained on the part of the grantor of an annuity, calling on *James Michell*, clerk, to shew cause why the warrant of attorney and other securities given to secure the annuity should not be delivered up to be cancelled, and proceedings stayed in the mean time. It appeared by the affidavits of *Ann Needham* and others, that previous to the year 1796, she became entitled to certain leasehold and freehold premises, (the latter subject to her mother's right of dower,) and in *April* of that year granted an annuity of 60*l.* to *James Michell* upon three lives for the consideration of 600*l.* which was secured on all the said premises. That 100*l.* part of the consideration money was paid by *Michell* by a banker's check delivered to one *J. H. S.*, Mrs. *Needham's* agent, by her desire, upon which payment was received by him for her a month before the execution of the deeds for securing the annuity, for which a discount was taken at the time of such execution. It was also alleged in these affidavits, that at the time of such grant the value of the freehold premises was not equal to the payment of the annuity. The memorial registered under the stat. 17 Geo. 3. c. 26, was of a bond of the grantor for securing the annuity, and also of an indenture dated 28th *April* 1796, whereby *Ann Needham* "in consideration of the sum of 600*l.* of lawful money, &c. paid to her by *J. Michell* in manner following, *viz.* 100*l.* therein-after paid by *J. M.* to *J. H. S.* or bearer by the direction of the said *Ann Needham*, and the further sum of 500*l.* paid at the time of the execution of the said indenture did grant, &c. to *J. M.* the annuity in question payable out of certain freehold premises, and also out of certain leasehold premises therein mentioned.

On the part of *Michell* it was sworn, that the freehold premises, which consisted of certain houses in *London*, had been represented by the grantor to be of the value of the annuity at the time, and so appeared to be on the inspection of his agent as well as from other circumstances which were stated: and that the 100*l.* had been advanced to the grantor a month before the deeds were prepared for her accommodation in the manner described. There were other matters in the affidavits not material to be stated.

The objection to the annuity principally relied on was, 1, assuming the value of the freehold premises not to be equal to the payment of the annuity, that the memorial was defective in stating that the 100*l.* part of the consideration for the annuity was paid to the grantor in money, whereas in truth the payment was made by a banker's check payable to *J. H. S.* or bearer, and delivered to him as the agent of the grantor by her desire. 2. That the same objection was fatal, though the freehold premises were of the requisite value, the annuity being also secured upon leasehold premises which were not excepted out of the operation of the statute.

Gibbs and *Marryat*, in shewing cause against the rule, insisted that as the money had been received by the grantor before the execution of the deeds for securing the annuity, the whole consideration was properly stated to have been paid in money; and it was immaterial to describe by what means the money had come to her hands. That the cases requiring the particular securities to be stated, only applied where those securities had not been converted into cash at the time, and therefore it was uncertain whether they would afterwards be available or not. That at any rate, as the annuity was secured on freehold premises of adequate value, the case was excepted by the 5th section of the act out of the general operation of it; and therefore, there was no necessity for any memorial to be registered.

Garrow and *Reader*, contra, contended, that the case came within the statute, unless the annuity were secured upon freehold alone of equal or greater annual value than the annuity. That here the freehold was stated to be of less value at the time, which was confirmed by its present state, and also by the very circumstance of the grantee requiring the additional security of the leasehold premises. Then the objection to the statement of the consideration in the memorial was fatal, according to the cases of *Berry v. Bentley*, 6 Term Rep. 690, and *Pool v. Cabanes*, 8 Term Rep. 328; where it was determined that if any part of the consideration of an annuity were paid by a banker's check, it ought to be so stated in the memorial.

GROSE, J. (a) It appears to me upon the whole, that the annual value of the freehold premises was more than equal to the annuity, and therefore there was no occasion to register any memorial; which gets rid of the objection as to the payment of the 100*l.* being therein stated to be in money instead of by a banker's check. I will however say a word or two on that point. All the prior cases in which it has been deemed necessary to set out in the memorial the payment of any part of the consideration money by bankers' checks (where such has been the fact) have been where the check was delivered as payment at the time of executing the deeds, when *non constat* it would ever be paid. But here the money had been actually received upon the check a month before by the grantor; therefore at the time of such execution the consideration might well be stated to be so much money paid to her.

LAWRENCE, J. It has never yet been determined that when the annuity is secured both upon leasehold and freehold property, though the annual value of the latter be equal to the annuity, yet a memorial of the annuity must be registered under the statute; and the reason of the act seems to be against such a construction. The object of the legislature was to guard necessitous persons against imposition; and therefore, they required that the grant of annuities in general should be memorialized, in order that it might appear what the true consideration was: but they excepted out of the general rule (among others) annuities secured on land of equal or greater annual value whereof the grantors were seised in fee or in tail in possession at the time; conceiving such persons to be in a condition to bargain fairly for themselves. The exception, therefore, cannot the less apply to one who in addition to a

(a) Lord *Kenyon*, C. J. was absent on this day from indisposition, and continued so during the rest of the term, with the exception of one day, when nothing particular occurred.

freehold of adequate value is in possession of leasehold property also upon which he can give security. Now, according to the weight of the evidence in this case it appears to me that the freehold was at least of equal value to the annuity. Then as to the objection taken to the memorial; if the money payable on the banker's check were actually received by the grantor before the grant of the annuity, it may, I conceive, be stated as money paid to her by the grantee, without particularizing the means by which the receipt of the money was before obtained by her.

LE BLANC, J. I think the balance of the evidence is, that the freehold premises were of adequate value to the annuity: they were so represented and considered to be at the time; and if they were not, it would have been easy for the grantor to have shewn distinctly when and how the value was lessened. As to the 100*l.* stated in the memorial to be paid in money, it having been actually received by the grantor before the deeds were executed was money had and received by her, by whatever means it was so received; therefore the consideration was truly stated in the memorial.

Rule discharged with costs.

Wilks and Another v. Back.

2 East, 142. Jan. 26, 1802.

One who executes a deed for another under a power of attorney must execute it in the name of his principal; but if that be done, it matters not in what form of words such execution is denoted by the signature of the names: as if opposite the seal be written "for J. B." (the principal) "*M. W.*" (the attorney). (L. S.)

THE defendant being indebted upon an account to the plaintiffs *Wilks* and *Browne*, who were formerly in partnership, as millers, it was agreed to refer the matter to arbitration; and accordingly bonds of submission were entered into by the parties as after mentioned; and the arbitrators by their award dated 14th August 1801, reciting that by two several bonds dated 15th June 1801, under the respective hands and seals of *M. Wilks* and *J. Browne*, millers, and late partners, and of *W. Back*, the parties became mutually bound to abide the award, &c. proceeded to award the sum of 407*l.* 9*s.* 7*d.* to be due on the balance of accounts from the defendant to the plaintiffs, &c.

Upon a motion to set aside the award, the question was at last resolved into this, whether *Wilks* had competent authority to bind *Browne* his late partner by executing the bond of submission for him. As to which it appeared, that by an indenture dated 28th August 1799, between *Wilks* and *Browne*, the latter, for the considerations therein mentioned, did constitute and appoint *Wilks* to be his attorney irrevocable to ask, demand, sue for, compound, and receive all the debts and effects of the said partnership; with full power for *Wilks* to sign, seal, and deliver, in the name of *Browne*, any deed, &c. whatsoever, necessary for the purposes therein mentioned, &c. By virtue of this authority, *Wilks* executed the bond of submission in this form: "*Mathias Wilks*," (L. S.). "For *James Browne*, *Mathias Wilks*," (L. S.), and it was sealed and delivered by *Wilks* for himself, and also for his late partner *Browne*; but the latter was not present at the time.

Garrow and *Parnter*, in shewing cause against the rule, did not dispute that according to *Combe's* case, 9 Rep. 76. b, where any has authority as attorney, to do an act, he cannot do it in his own name, but in the name of him who gave the authority. But they contended, that here the sealing and delivery was done by *Wilks* in the name of *Browne* as well as of himself, which he had authority to do by virtue of the power of attorney of August, 1799: and that the signing of his own name twice was not material, as he also signed the name of *Browne*, and declared that it was done for him. The form of

words used cannot invalidate the act where the authority is sufficient to warrant the act done. If there had been only one seal, yet if the instrument were sealed and delivered for himself and his partner, he having authority so to do, it would have been sufficient, according to the case of *Ball v. Dunsterville*, 4 Term Rep. 313. It is true, that was done in the presence of the other partner; but that was only material in that case, as shewing that it was done by his particular authority; and here was a special authority by deed to do the act.

Erskine and Comyn, contra. It is clear from *Harrison v. Jackson*, 7 Term Rep. 207, that one partner cannot as such bind another by deed. Then if the authority be derived from the power of attorney, *Wilks* ought to have executed it in the name of *Browne* the principal, and not in his own, according to what was said in *Combe's* case, and confirmed by Lord C. B. *Gilbert* in 4 Bac. Abr. 140, and by Lord *Kenyon* in *White v. Cuyler*, 6 Term. Rep. 177. So in *Frontin v. Small*, 2 Ld. Ray. 1418, S. C. 1 Stra. 705, a lease made by an attorney in her own name, though stated to be "made for and in the name of" the principal, was holden void, and that no action of covenant lay thereon. Now here it was signed by *Wilks* "for *Browne*;" whereas the signature ought to have been in the name of *Browne*, though made by *Wilks*. Therefore, as *Browne* would not be bound by the award, it was void for want of mutuality.

GROSE, J. No doubt the award must be mutual: and for this purpose the bond must be executed by *Browne* as well as by *Wilks*; but this is a sufficient execution by both. I accede to the doctrine in all the cases cited, that an attorney must execute his power in the name of his principal and not in his own name; (1) but here it was so done; for where is the difference between signing *J. B.* by *M. W.* his attorney (which must be admitted to be good) and *M. W.* for *J. B.*; in either case, the act of sealing and delivering is done in the name of the principal, and by his authority. Whether the attorney put his name first or last cannot affect the validity of the act done.

LAWRENCE, J. No doubt in point of law, the act done must be the act of the principal, and not of the attorney who is authorized to do it. The whole argument has turned upon an assumption of fact that this was the act of the attorney, which is not well founded. This is not like the case in Lord *Raymond's* Reports, where the attorney had demised to the defendant in her own name, which she could not do; for no estate could pass from her, but only from her principal. But here the bond was executed by *Wilks* for and in the name of his principal: and this is distinctly shewn by the manner of making the signature. Not that even this was necessary to be shewn; for if *Wilks* had sealed and delivered it in the name of *Browne*, that would have been enough without stating that he had so done. However, he first signs his own name alone opposite to one seal to denote the sealing and delivery on his own account, and then opposite the other seal he denotes that the sealing and delivery was for *James Browne*. There is no particular form of words required to be used, provided the act be done in the name of the principal.

LE BLANC, J. *Wilks* first signed it in his own name, as for himself, and then to denote that the act was also done in the name of *Browne*, he signed it again for *James Browne*. I cannot see what difference it can make as to the order in which the names stand.

Rule discharged.

(1) Vide *Fowler v. Shearer*, 7 Mass. Rep. 14. 19. *Simonds v. Catlin*, 2 Caines 61. 66. If one covenant under his own hand and seal, on account of another, he shall be personally liable. *Appleton v. Binks*, 5 East 148. *Tippets v. Walker & al.* 4 Mass. Rep. 595.

Hulle v. Heightman.

[S. C. at *Nisi Prius*, 4 Esp. 75.]

2 East, 145. Jan. 27, 1802.

contracted to go a voyage from *A.* to *B.* and back again, with a stipulation not be entitled to his wages till the end of the voyage, cannot maintain a *restitutio in integrum* to recover his wages *pro rata* as far as *B.*; though he were dismissed by the defendant (the captain:) but his remedy is, either for the special contract, or for such tortious act of the captain's, whereby he is deprived of earning his wages.

TATUS *Assumpsit* for wages due to the plaintiff as a seaman on a Danish ship, whereof the defendant was captain, from *Altona* to *Plea, non assumpsit*. At the trial before *Le Blanc, J.* at the sittings term at *Guildhall*, the plaintiff proved a service in fact as a seaman on the ship at and from *Altona* until her arrival at the port of *London*. It appeared that after the ship had delivered her cargo here, the captain refused to give the seamen victuals, but bid them go on shore, saying he could not be responsible for their countrymen to go back for their victuals only since the captain was not responsible for them. That the plaintiff and others went on shore; and when the captain refused them a few days afterwards to go on board again, they refused, saying it was too late, for they had the law of him. (They had then brought actions against him.) That previous to his departure for *Denmark*, he again required them to come on board, which they again refused. The defence rested on certain written articles of agreement signed by the plaintiff and the rest of the crew, whereby it appeared that they were hired for the voyage from *Altona* to *London* and back again. And there was an express stipulation, that the seamen should assist in bringing the ship back again, and making her fast in a proper place, before they could make any demand upon the captain for the wages due, under a certain penalty: and another stipulation that no person should in foreign parts demand any money of the captain, but be contented with the wages received in advance, until the voyage was completed to the satisfaction of the captain and owners, and the ship and goods again safely arrived at *Altona*. And also, that it should at all times be at the captain's own option whether he would give them any money in foreign parts or not. That in like manner no person should demand his discharge in foreign parts, but be obliged to perform the voyage. It concluded with a general clause of obedience to the captain, and for the performance of the duty of the crew: and that if any one should shew himself averse therein, he should not only according to law forfeit the whole of his wages, but also suffer punishment, &c. On proof of this agreement it was insisted by the defendant's counsel at the trial, that the plaintiff had mistaken his remedy, and that an action of *indebitatus assumpsit* would not lie, but that he ought to have declared specially. On the other hand it was contended, that the plaintiff might recover in this form of action for the rate of his wages up to the time when he was wrongfully turned out of the ship. But *Le Blanc, J.* being of opinion that the wrongful act of the captain did not rescind the special contract by which the plaintiff was precluded from demanding his wages till the end of the voyage; though it gave a cause of action against the captain for the tort whereby the plaintiff was prevented from earning his wages under the contract, directed a nonsuit; with leave to move to set it aside and enter a verdict for the plaintiff for 6*l.* 17*s.* the amount of the wages due to him at the time he left the ship, if he were entitled to recover.

Gibbs now moved accordingly; and an end to by the wrongful act of the defendant, a special contract was put in place, which eventuated the plaintiff's claim.

from performing the whole of what he had undertaken on his part. And therefore he had a right to recover in this form of action so much of his wages as he had actually earned by his labour, and for which he was entitled to a reasonable compensation. And this he said had been so decided some years ago(a), and had been generally adopted in practice. But

The Court, referring to the case of *Weston v. Downes*, Dougl. 23, as establishing the principle that while the special contract remained open and not rescinded by the defendant, the plaintiff could not recover on the general counts in *assumpsit*, held that the nonsuit was proper; the contract still operating; and

Refused the rule(b)(1).

Billett v. M'Carthy.

2 East, 148. Feb. 1, 1802.

One who was arrested at the suit of the plaintiff, and liberated on bail prior to the 1st of *March* 1801, and was afterwards committed in execution at the suit of the same plaintiff before the passing of the insolvent act of the 41 G. 3. c. 70, is entitled to be discharged by the 6th section of that act on the conditions thereby imposed. And this, where he was so taken in execution upon a judgment confessed for the amount of the costs as well as for the original debt, for which he had been arrested by writ out of an inferior court before the 1st of *March*; the 34th section providing that no person entitled to the benefit of the act should be imprisoned by reason of any judgment for any debt, costs, &c. owing or growing due before the said 1st of *March*.

THE last insolvent debtors' act of the 41 Geo. 3. c. 70, contains a clause (s. 4.) in the usual form; whereby "all and every person and persons, who, on the first day of *March* 1801, were charged in any prison or gaol for the non-payment of any debt or debts, sum or sums of money, which did not in the whole amount to a greater sum than 1500*l.*, and whose name or names shall be inserted in any such list to be delivered in as aforesaid: taking the oaths, &c. and shall perform on their part what is required to be done by the act; shall, as to his person and effects respectively, be for ever released, discharged and exonerated to such extent, and in such manner as is thereinafter provided, and no otherwise." By s. 5. (a new clause). "Any person who, on the said 1st of *March* 1801, was charged in any prison or gaol, or in custody of any keeper or gaoler of any prison or gaol, for the nonpayment of any debt or debts, or sums of money, not exceeding, &c. and who shall have been discharged by any creditor or creditors, without the consent of such debtor after the said 1st of *March*, and before the passing of this act, may nevertheless take the benefit thereof, &c. in like manner as if he were in custody at the time of passing this act: provided any such person shall petition, &c. and give notice," &c. Then the 6th section (also a new clause) provides "that if any person shall have been or shall be committed to any gaol or prison, or to the custody of any keeper or gaoler of any gaol or prison respectively, at any time before the passing of this act, for any debt or debts, sum or sums of money, for which he or she shall have been imprisoned, at any time before the said first day of *March* 1801, and at the suit of the same plaintiff; then and in such case every such person shall be entitled to all the benefits of this act, and be deemed and construed to be within all

(a) The name of the case was not mentioned at the bar. *Qu.* Whether it were Mr. Keck's case at *Oxford*, 1744, Bull. N. P. 139? or *Harris v. Oke*, at *Winchester Sum. Ass.* 1759, cor. Lord Mansfield, *ib?* which bear upon this point.

(b) Vide *Weaver v. Boroughs*, 1 Stra. 648, and *Towers v. Barrett*, 1 Term Rep. 133. [And see the rule laid down by Sir James Mansfield in *Cooke v. Munstone*, 1 New Rep. 355, which was distinctly recognized and established by the supreme Court of *New-York* in *Tuttle v. Mayo*, 7 Johns. 132. Note (2) to *Leeds v. Burrows*, 12 East 5.]

(1) [See acc. *Algeo v. Algeo*, 10 S. & R. 235. *Donaldson v. Fuller*, 3 do. 505. *Harris v. Leggett*, 1 W. & S. 301.—W.]

"and every the provisions thereof, in like manner, in every respect, as if he "or she had been charged in any prison or gaol, and was actually imprisoned "or in custody on the said first day of *March* 1801," &c. This act was "passed on the 27th of *June* 1801.

The short facts of the case, so far as they are material to be stated, were these: The defendant, being indebted to the plaintiff in 50*l.* on a bill of exchange, was arrested on a writ out of the palace court for the debt, in *October* 1796, and gave bail; and after some proceedings, the defendant signed a cognovit, with a stay of execution on certain terms then agreed on. These terms not having been complied with, judgment was entered up, and other proceedings were had against the bail without effect; and in *February* 1801, it was finally agreed that the defendant should give the plaintiff a warrant of attorney to confess judgment, which was accordingly given, for 97*l.* including the original debt and costs, of which 15*l.* 15*s.* was to be paid on the 20th of *March* 1801, and the remainder by weekly instalments. The first instalment was paid at the time; but the defendant afterwards making default, judgment was entered up against him on the 28th of *March*, and he was arrested on a *ca. sa.*, and on the 12th of *June* 1801, was committed to the custody of the warden of the Fleet, and gave notice of his intention to take the benefit of the last insolvent act, at the last *October* sessions in *London*, when he was discharged. It also appeared by the defendant's affidavit, that he had been arrested and imprisoned at the suit of one *G. M'Guaran*, in *Michaelmas* vacation 1800, for a certain debt, to which he had put in bail, and that he had been, *before* the passing of the said insolvent debtors' act, committed to the Fleet in execution in the same action. But it did not appear that he was in custody on the 1st of *March* 1801.

The plaintiff thereupon obtained a rule calling on the defendant to shew cause why the plaintiff should not renew the *ca. sa.* issued on the judgment in this cause, and retake the defendant. This was at first attempted to be supported on the ground of fraud in the defendant in obtaining his discharge; but finally the question was resolved into the construction of the act of parliament.

Erskine and *Marryat* shewed cause against the rule, and contended, that the defendant's case came within the 6th section of the act; and that the sum for which judgment was entered up, and execution taken out being compounded, as well of the costs as of the original debt for which he had been in custody upon the arrest, before the 1st of *March*, made no difference; neither was it material that the first instalment was agreed to be taken after that period; being *debitum in presenti solvendum in futuro*. And they relied on the 34th section, which enacts, "that no person entitled to the benefit of the "act should thereafter be imprisoned by reason of any judgment or decree for "payment of money only, or for any *debt*, damages, or *costs*, sum or sums of "money contracted, incurred, occasioned, *owing* or *growing due* before the said 1st of *March* 1801," &c. and they referred to *Cotterel v. Hooke*, Dougl. 97, where it was taken for granted that a bond for securing an annuity which had become forfeited before the day named in an insolvent act, on which the defendant was discharged, was thereby gone, although the party might still be sued for subsequent breaches upon a covenant for securing the same annuity.

Garrow, contra, said, that by the very terms of the 34th section, no person could avail himself of it who was not *entitled* to the benefit of the act; and therefore the question still reverted to this, whether on the construction of the antecedent clauses the defendant was so entitled? That the word made use of in the 6th section, which was relied on, is *imprisoned*, which means an actual commitment to prison, and not merely an arrest on mesne process, on which the party is bailed. That the object of the act being humanity and not justice, it might fairly be considered as the intention of the legislature to

make that distinction between those who were in a condition to liberate themselves on bail, and were therefore only constructively imprisoned, and such as were actually confined in prison. If the former had been meant, the phrase would have been "arrested and bailed," instead of "imprisoned." Besides, the warrant of attorney constituted a new debt, for which he was not liable till the 20th of *March*, when the first instalment became due; and therefore the 6th section of the act does not apply to this case.

GROSE, J.(a) Whatever doubts I entertained at first, considering that the last insolvent act confined the description of the objects to be benefited by it to the 4th clause, as prior acts had done; yet upon referring to the new provisions in the 5th and 6th clauses, I am satisfied that the defendant's case falls within the latter. I consider that he was a person *imprisoned*, within the meaning of the act, before the 1st of *March* 1801, having been arrested at the suit of the plaintiff for this debt, and obliged to give bail. We ought to give as large and beneficial a construction as the words will admit of, in furtherance of the intention of the legislature. The very alteration in the wording of the several clauses confirms this construction; for the 4th and 5th clauses speak of persons "charged in any prison or gaol, or in the custody of any keeper or gaoler of any prison or gaol." Then the 6th clause expressly marks the difference; for it speaks first of any person "committed to any gaol or prison," &c. at any time before the passing of the act for any debt for which he shall have been *imprisoned* at any time before the 1st of *March*. The word *imprisoned* is of much larger signification than the former description: therefore, I think that the legislature meant to extend the benefit of the act to persons, who, having been arrested for any debt before the 1st of *March*, were after that time, and before the passing of the act, committed to prison at the suit of the same plaintiff for such debt. Such I think was the situation of this defendant; and if he were entitled to be discharged under the act, it is unnecessary to enter into any formal question as to the mode in which his discharge was obtained.

LAWRENCE, J. The general question on the construction of the act is now the only one to be considered: upon which I agree that a person arrested, and giving bail before the 1st of *March* for a debt before then due, is to be considered as *imprisoned* within the true construction of that word in the 6th clause. That this was the meaning of the legislature is very apparent, upon comparing that clause with the fourth. The general object was to enable debtors to get discharged out of custody upon giving up their effects to their creditors: but it was necessary in so doing to guard against improper practices; and therefore, by the fourth section, the benefit is confined to persons actually charged in prison for debt on the 1st of *March* 1801. And by the sixth section it is extended to persons actually committed to prison before the passing of the act, provided they were imprisoned before the 1st of *March*; evidently, therefore, looking to the case of persons who had been bailed out in the intermediate time, and who were therefore not in actual custody on the 1st of *March*. One arrested and bailed may to all intents and purposes be said to have been imprisoned.

LE BLANC, J. We ought to construe the words of the act liberally, in order to effectuate the intent of the legislature; which was, that persons in custody for debt should be discharged on certain conditions. The act provides for three descriptions of persons: 1. Those who were charged in any prison or gaol on the first of *March* 1801, and so continued till the passing of the act. 2. Those who were so charged on the 1st of *March*, but were discharged without their consent by their creditors after that day, and before the passing of the act. And 3. Those who having been arrested before the first of

(a) Lord *Kenyon*, C. J., who was present when this case was first agitated on a former day, was now absent from indisposition, and continued so during the remainder of the term.

March, though not in actual custody on that day, shall afterwards have been committed in actual custody for any debt at the suit of the same plaintiff before the passing of the act. The different manner of wording the several clauses warrants the opinion that the Legislature looked to the difference contended for; for in the former part of the 6th clause they speak of persons "*committed to any goal or prison*," and in the latter part they change the description to persons who shall have been *imprisoned* before the 1st of *March*. Now it is plain that one who has been arrested, though for ever so short a space of time, and giving bail, by whom he is liable at any time afterwards to be retaken again, comes within the description of a person who has been imprisoned; and then the case is brought expressly within the 6th clause.

Rule discharged.

Pindar v. Wadsworth.

2 East, 154. Feb. 1, 1802.

A commoner may maintain an action on the case for an injury done to the common by taking away from thence the manure which was dropped on it by the cattle; though his proportion of the damage be found only to the amount of a farthing: at least the smallness of the damage found is no ground for a nonsuit.

THIS was an action on the case by a commoner against a stranger for injuries to his right of common.

The first count of the declaration stated, that the plaintiff was possessed of a certain messuage and land, &c. in the parish of *Bambrough* in the county of *York*, by reason whereof he was entitled to have common of pasture on a certain waste called *Bambrough* Common for all his commonable cattle levant and couchant, at all times of the year; and that the defendant knowing the premises, but contriving to injure him and deprive him of the advantage of his said common, &c. wrongfully carried from off the said common and converted to his own use so many loads of manure and dung which before, &c. had been dropped and made on the said common by the cattle from time to time feeding thereon, and which ought to have remained there for the purpose of nourishing and increasing the herbage there; whereby the said common and the herbage thereof were then and there greatly impoverished for want of the said manure and dung which would otherwise have remained on the said common and increased the herbage and grass thereof; and thereby the plaintiff, during the time aforesaid, could not use the said common of pasture upon the said common in so beneficial a manner as he ought to have done, and would otherwise have done, &c. and his said right of common by means of the premises has been greatly lessened in value, &c. The second count was for injuriously causing to be placed and made so many heaps of dung and manure upon the said common, and wrongfully continuing the same for a long time, &c. whereby the plaintiff during that time was obstructed in the said common of pasture, and could not enjoy the same in so ample and beneficial a manner as he otherwise might have done, &c. The third count was for a common trespass.

At the trial at *York* before Lord *Alvanley* it appeared that the plaintiff had a right of common upon the waste in question, and turned his cattle thereon. That the defendant, who farmed two acres of land of the plaintiff adjoining the common, had made a practice for a long time before the action brought of gathering up the dung from the common and carrying it off in baskets and wheel-barrows for sale. That he and others had been frequently warned against this practice, but without effect, though the defendant had often promised not to repeat it. The common was between two and three hundred acres in extent, and the lordship of the manor was disputed by several claim-

ants. For the defendant it was insisted, that as each of the commoners (of whom it was said there were 42) had an equal right to bring an action, and as the injury, if any, was so trifling, the action would not lie; and the plaintiff ought to be nonsuited. In support of which were cited *Robert Mary's* case, 9 Co. 113, Bull. N. P. 120, and a case of *Rigg v. Parsons*, before *Chambre, J.* at the last *Lent* assizes for the county of *Lancaster*; where in an action on the case in the nature of waste the learned Judge was stated to have said, that in analogy to the action of waste, in lieu of which the present form of action was substituted, unless the damages found amounted to 3s. 4d. the plaintiff could not have judgment. Lord *Alvanley*, however, refused to nonsuit the plaintiff, but left it to the jury to say whether the plaintiff had sustained any and what damages; and they found a verdict for him on the first count with one farthing damages. In *Michealmas* term last a rule *nisi* was obtained for entering a nonsuit.

On that occasion Lord *Kenyon, C. J.* (who was not present in court on this day) said, that this had been *vexata questio* for two centuries past. That Lord *Coke* was of opinion that a commoner could not maintain such an action without shewing that he had sustained an actual injury. And in a case which he remembered to have occurred when he was at the bar, where the lord of the manor had given leave to Mrs. *Lessingham* to build a cottage on the waste at *Hampstead*, for which an action was brought by a commoner, Lord *C. J. De Grey* was of the same opinion. That he himself could not then understand why the smallness of the damage could make any difference in point of law: but when he found that the learned Judge had grounded his opinion on the authority of Lord *Coke*, he submitted his judgment to theirs.

Lambe now shewed cause. No question can arise in this form of action on the amount of the damage, but only whether any damage were sustained by the plaintiff; that was properly left to the consideration of the jury, and they have found the fact for him. It also appears that the defendant was a wilful wrong-doer, having persisted in doing the injury complained of for a long time, and after notice to desist; and is therefore not entitled to favour. If he had a right to do the act, all the world have the same right. It was left to the jury to say whether this were a substantial deterioration of the common; and the decision of that fact with the plaintiff decides the case; for if the common were deteriorated, all the commoners who used the common must sustain an injury. It cannot be denied that acts of this nature must impoverish the common. It can make no difference whether the manure dropped from the cattle on the common, or was put there purposely by the commoners: and then it must follow, that if this action will not lie, no action would lie for taking away the manure in the other instance. Mrs. *Lessingham's* case before Lord *C. J. De Grey* did not pass without disapprobation at the time: but there the cottage was built on the common by leave of the lord, which might vary the consideration. At any rate, that case was ruled prior to the determination in *Wells v. Walling*, 2 Blac. Rep. 1233, where it was settled that an action on the case lay for a surcharge of the common, although the plaintiff had not turned on any cattle of his own at the time of the surcharge. And *De Grey, C. J.* said, it is sufficient if the plaintiff's right be injured, whether it be exercised or not. *Gould, J.* said, that he had always thought the doctrine of Lord *Coke* in *Mary's* case, 9 Co. 113, that there must be a loss of the common in order to maintain this action, a singular doctrine of his own, and no part of the judgment of the court. And that it appeared from 2 Brownlow, 140, that an action lay for this damage, be it ever so minute. *Blackstone, J.* observed, that any act which would ground a *per quoad*, and lessen the profit of the common, would support an action against the commoner. Now the profit may be lessened as well by taking away that which contributes to produce the grass, as by eating it when produced. *Nares, J.* referred to the case of the *Tunbridge Wells* dippers, 2 Wils. 422, to shew that a probable damage

was a sufficient injury to ground an action. In the last-mentioned case it was impossible to prove any specific damage suffered by any individual dipper by the interloping of a stranger: but the court said it was an injury to all who were interested. Then if so, it must necessarily be an injury to each. Then came the case of *Hobson v. Todd*, 4 Term Rep. 71; in which all the former cases were considered; and there it was determined that one commoner could maintain an action on the case against another for a surcharge, although he himself had also surcharged the common, and consequently had had more enjoyment of it than he was entitled to. There *Buller, J.* expressly disclaimed any consideration of the smallness of the damages; and said, the only question was, Whether *any* injury had been done by the defendant to the plaintiff? The defendant, he said, was a wrong doer, and the plaintiff was entitled to the action without proving any specific damage. He also observed, that there was another ground on which the action might be supported, namely, that the *right* was injured. And that if a commoner could not maintain such an action because his own cattle had grass enough, he must permit a wrong-doer, like the defendant, to gain a right by the length of possession: It was said at the trial, that the lord might bring the action, but not a commoner, in order to prevent a multiplicity of actions; but that is no objection where the injury is done to many, as in this case. The same might be urged against an action by one commoner against another for surcharging the common, which lies without dispute. So, if any commoner build on or inclose the common(a). Besides, the lord may collude with another, and refuse to bring the action; or, as in the present case, the property of the manor may be disputed.

Barrow, contra, endeavored to support the rule on three grounds; 1, because the exility of the damage, of which the law would not take notice in order to support an action; 2, to avoid multiplicity of actions; 3, to avoid circuity of action. 1. *Mary's case*, 9 Co. 113, is in point, that for every feeding by the cattle of a stranger the commoner shall not have an assize nor an action on the case; but the feeding ought to be such *per quoad* the commoner could not have common of pasture for his cattle, but *proficuum suum inde per totum idem tempus amisit*. So that if the trespass be so small as that he has not any loss, &c. he shall not have an action for it; but the tenant of the land may in such case have an action. Here the damage is only estimated at a farthing. And by analogy to the old action of waste, as the damage does not amount to 3s. 4d. the plaintiff is not entitled to judgment. This rule was holden to apply to an action on the case in the nature of waste, by *Chambre, J.* in *Rigg v. Parsons* before mentioned; to which the present action bears great affinity. And it is supported by Bull: N. P. 120, and *The Keepers and Governors of Harrow School v. Alderton*, 2 Bos. & Pull. 86, where all the cases on this subject are collected. Then if the defendant would be entitled to judgment on this finding, it goes to the cause of action, and will sustain the present application to enter a nonsuit. 2. If this be such an injury for which an action lies by one, it is equally maintainable by all the commoners respectively, which will lead to a multiplicity of suits; to avoid which the law gives the action, if at all, to the lord only. Where the injury is small and common to a great many, none of them shall have an action, according to *Williams's case*, 5 Co. 72 b.; as for non-performance of divine service in a manerial chapel; for nuisances in highways, &c. And this agrees with *Mary's case*(b) before mentioned, in which is cited *Buttolph v. Kipping*, H: 5 Jac. 1. in C. B. -3. The court will enter a nonsuit in this case, to avoid circuity of action. For by the stat. 22 & 23 Car. 2. c. 9. s. 136, for the prevention of trivial and vexatious suits, in all actions of trespass, assault and

(a) Vide 1 Roll. Abr. 89. pl. 8. & 405, and 2 Leon. 203.

(b) 9 Co. 113. a. and vide 1 Brownl. 197.

battery, and other personal actions, where the Judge shall not certify that the freehold or title of the land mentioned in the declaration was chiefly in question, the plaintiff, in case the verdict is under 40s., shall not recover more costs than damages, &c. "and the defendant may have his action against the plaintiff for such vexatious suit, and recover his damages and costs," &c.

GROSE, J. It was properly left to the jury to say whether any damage were sustained by the plaintiff, and they have found that there was damage. It is true, that the amount is but trifling; but the defendant appears by the evidence to have been a very perverse tortfeasor; for he persisted in taking the manure from off the common again and again after repeated warnings to abstain. Then the only question is, whether a man cannot maintain an action against another for doing that which is an undoubted injury to him as well as others, because the amount of the individual damage is proportionably small. But it is said, that a commoner cannot maintain an action for a trifling damage done to the common, but that the lord alone shall have the action. I know not how that remedy is to be obtained in this case; for it appears by the report that the ownership of the manor is at present uncertain, being claimed by several persons; and can it be contended that wrongdoers may continue to commit torts upon the commoners with impunity till the title of the lord can be ascertained? It is true, that in *Mrs. Lessingham's* case Lord C. J. *De Grey* rather inclined against the action; but I well remember that many eminent persons of the profession did not approve of that doctrine: and I also know, that in the case of *Wells v. Wailing*, Mr Justice *Gould* was decidedly of a very different opinion; and questioned the doctrine of Lord *Coke* in *Mary's* case: and in the case of *Hobson v. Todd* Mr. Justice *Buller* was clearly of opinion, that the smallness of the damage was no bar to the action by the commoner; but that the question was, Whether any injury had been sustained by him? That indeed was the case of a surcharge by a commoner: but the principle is the same: and I remember an argument urged by the last-mentioned Judge which weighed very much with me; that if a commoner could not maintain an action of this sort, a mere wrongdoer might by repeated torts in course of time establish evidence of a right of common. The jury having found that the plaintiff has in fact sustained a damage, I do not see how we can say that the action is not maintainable; or by whom else it is to be maintained if not by him. Then it is urged, that if one commoner may maintain an action, all the rest may, which will lead to a multiplicity of suits. The plain answer is, that if a man will commit an injury to many instead of one, he must make satisfaction to all; and it does not lie in his mouth to say, that because he has injured the rights of many, therefore he shall make reparation to none. On the contrary, the more extensive the injury, the more ought he to be bound to make compensation.

LAWRENCE, J. This matter comes on upon a rule for leave to enter a nonsuit; and therefore the last objection urged against the verdict, so far as it arises upon the stat. 22 and 23 Car. 2. c. 9, does not apply; because that statute supposes that the plaintiff may maintain an action; but in case the damages recovered are under 40s. and the Judge does not certify, it gives the defendant a remedy for such a vexatious suit by action. However, it has been generally supposed, that that statute only relates to actions of trespass(a). Then it is objected, that the maintenance of the action would tend to a multiplicity of suits: but if there were any weight in that argument, it would also go to shew that no action could be maintained by a commoner for any injury, however serious, done to his right of common; as if a stranger had driven a herd of cattle on the common, and kept them there for a month; because it might be said that if one action of this sort were maintainable each of the commoners to the amount of forty-two would have the same remedy

against the wrong-doer: but that is clearly otherwise. Then the objection is resolvable into this, that the amount of the damage sustained is too small to support an action. But all the cases which have been cited only go the length of shewing that if the commoner cannot prove damage sustained by him in consequence of the wrongful act of the defendant, the action will not lie. For if he have not been prejudiced, he cannot be entitled to reparation. Whereas here the jury have found damage sustained by the plaintiff, though but to a small amount; therefore he has made out that which is the ground of this action; and if so, the smallness of the damages can be no reason for entering a nonsuit. However, the opinion I have delivered is without prejudice to any objection in arrest of judgment.

LE BLANC, J. The only grounds for making the rule absolute must be either, that no action lies by a commoner for such an injury, however great the amount; or that the damage sustained in the particular case is too small to support an action. Here the plaintiff was bound to shew that he had sustained some damage; for he was only entitled to recover to the extent of the damage sustained by him. Then can it be contended, that taking away *all* the manure from off the common would not prejudice the commoners? And if so, the defendant having taken away so much, that constitutes a damage. Then the jury have ascertained the extent of the damage sustained by this plaintiff at a farthing. Therefore, the act done by the defendant being injurious to the common, and the extent of the injury done to the individual commoner having been ascertained, there can be no reason because of the smallness of the damages for entering a nonsuit. The decision in the case of the keepers, &c. of *Harrow School v. Alderton*, 2 Bos. & Pull. 86, was made with reference to the old doctrine in actions of waste, whereby the thing wasted is to be recovered as well as damages.

Rule discharged.

The King v. The Inhabitants of Woodland.

2 East, 164. Feb. 8, 1802.

A slate-work, (or as improperly called a slate-mine) is rateable to the poor.

AT the Quarter Sessions at *Lancaster*, *John Woodburn* appealed against a rate made for the relief of the poor of the townships or divisions of *Woodland*, *Heathwaite*, &c. within the parish of *Kirkby Ireleth*. The Court confirmed the rate as to the several sums assessed upon the appellant for his lands and woods(a); and as to the several sums assessed upon him for his *slate-works*, the court (being of opinion that the appellant ought not to be rated for his slate-works) amended the rate by expunging the same; subject to the opinion of this court on the following case:

The appellant is the occupier of certain slate quarries in the said township. The working of such quarries is attended with great expence and risk, and is considered always as a matter of uncertainty and speculation. The outward surface of the country when the soil is taken off is generally a sort of rock composed of slate mixed with coarse stone, which is very hard, and not at all proper for splitting into slates. Some idea may be formed by skilful persons whether the proper kind of slate may be found below. The process adopted for procuring slates is first to remove the soil, and then to blast the coarse outward rock by means of gunpowder. Sometimes a good vein of pure slate is discovered. But it has often happened that works have been carried to the depth of thirty yards at the expence of some hundred pounds without

(a) The relative sums assessed were as follows: for the lands 2*l.* 9*s.* 6*d.* for the woods 1*l.* 9*d.* and for the slate-works the several sums of 2*l.* 2*s.* 6*d.* and 1*l.* 5*s.*

meeting with any. The best slate is at the bottom of the quarries, many of which are upwards of fifty yards deep. A good vein when found may last for some years: at other times the veins are soon worked out. A shaft is never sunk, as in coal-pits, the quarries being commonly worked by day-light; though a level has been known to be driven one hundred yards under ground. When the pure slate is found large blocks are detached by means of gunpowder, which are afterwards split by iron tools or gunpowder into thin pieces of merchantable slate. These ought not to be thicker than half an inch, and are more valuable according to their lightness. It is so difficult to procure pieces of sufficient size and of the proper thinness, that for one cart load of merchantable slates it is usual to be encumbered with forty cart loads of refuse slate of no value, though of the pure sort of slate, being too small for use. When quarries are opened in the waste, a rent is sometimes paid to the lord for a certain district: sometimes he receives a sum of money for every ton of slate procured. In the inclosures a rent is generally paid for the land. The slate mines have never before been rated.

The Attorney-General and Raincock in support of the order of Sessions. It is agreed, that mines in general are not rateable to the poor within the stat. 43 Eliz. c. 2, and that the mention therein of coal-mines is not by way of example, but in exclusion of all other mines, according to the maxim that *exceptio unius est exclusio alterius*. Upon this principle lead mines were holden not to be rateable(a). The only cases in which this species of property has been determined to be rateable, have been where there was no risk or uncertainty; as in *Rouls v. Gell*, Cowp. 451, where the lessee of lead-mines received certain profits called lot and cope from the adventurers who worked the mine, without any risk or expence on his part. Or as in *R. v. St. Agnes*, 3 Term Rep. 480, where the owners of fee farm of tin and toll tin were deemed rateable for such profits. But here the case states, that the mines are worked at great expence and risk. The only authority which bears hard against the appellant is that of *Rez v. Alberbury*(b), where lime works were adjudged to be rateable. But the working a slate mine is more a matter of science and adventure than conducting a lime-work. The lime-stone is found near the surface, and is applied to use as it is dug up, and no skill is required to prepare it for market; in all which particulars it differs from the present subject matter, which may more properly be considered in the nature of a mineral, and comes within the general exception as to mines.

Wood and Hornby, contra, were stopped by the Court.

GROSE, J. The only ground on which it is contended that the subject matter is not rateable is, because it is denominated *a mine*: but though that word has slipped in at the end of the case, yet it cannot alter the nature of the thing, which is nothing more than a slate-work, and no mine in the proper sense of the word. Then how is it possible to distinguish a slate-work in this respect from a lime-work, which has been determined to be rateable? The express mention of coal mines in the statute has been holden to be an exception of other mines; but there cannot be a doubt but that a slate-work, not being a mine, and producing profit, ought to be rated. And the case expressly distinguishes between the annual value of the slate-works, and of the lands which were separately assessed for their respective values.

LAWRENCE, J. I consider the case of *Rez v. Alberbury* as having decided this point: but if this be a mine, the subject matter in that case was improperly described. In truth, however, neither lime nor slate-works can be deemed to be mines, in the sense in which they were construed in the case of *Rez v. Richardson* to be virtually excepted out of the stat. 43 Eliz. For Lord Mansfield, speaking of such mines, confines the exception to such as are gov-

(a) *The Governor and Company for smelting down Lead, &c. v. Richardson and others*, 3 Burr. 1841.

(b) *Ante*, 1 vol. 534.

erued by particular laws of their own ; like those in *Devonshire*, *Cornwall*, and other counties, the ownership whereof is exercised in a different manner from that of the soil. And this he considers might be a reason why they were not named in the statute. Now that part of his argument is totally inapplicable to the present case. But if every substance which is raised from under the surface of the soil is to be considered as the produce of a mine, and therefore that the profits of it are not rateable, the exception will equally extend to gravel, sand, marle, stone, and the like ; none of which were ever considered as the produce of mines.

LE BLANC, J. This case is within the principle of the decision in *Rez v. Alberbury*, and is not within the virtual exception of the stat. 43 Eliz.(1).

Order of Sessions quashed.

The King v. The Inhabitants of Clifton.

2 East, 168. Feb. 3, 1802.

An appointment of one overseer alone for a township is bad in law ; the stat. 13 & 14 Car. 2. c. 12, requiring at least two : and a certificate granted by such overseer is void, and gives no security to the certificated parish against the gaining of a settlement there by the party named therein ; such certificate not being made pursuant to the stat. 8 & 9 W. 3. c. 30, which requires it to be made " by the church-wardens and overseers, or the major part, or " by the overseers, where there are no church-wardens."

TWO justices by an order removed *J. Hollis*, his wife and children by name, from the township of *Clifton* to the township of *Yieldersley*, both in the county of *Derby*. The Sessions on appeal quashed the order, subject to the opinion of this court, on the following case :

R. Hollis, the father of the pauper *J. Hollis*, in the year 1780, went with his family to reside at *Yieldersley*, under a certificate dated the 18th November 1780, under the hand and seal of *J. Warrington*, only overseer of the poor of the township of *Sturston* in the parish of *Ashborne* in the said county, and duly allowed by two justices, acknowledging the said *R. H.*, *Hannah* his wife, and *Joseph* their child (the pauper) to be inhabitants legally settled in *Sturston*. The said *R. H.* with his family resided at *Yieldersley* under the said certificate about a year, when he returned to *Sturston* with his family, except the pauper *Joseph*, who was then only two years old, who was left with his grandfather in *Yieldersley*, with whom he resided till he was sixteen years old, when he was hired and served a year in *Yieldersley*. The parish of *Ashborne* consists of five townships, viz. *Yieldersley*, *Sturston*, *Clifton*, *Offcote* and *Ashborne*. The townships severally maintain their own poor, and have separate and distinct overseers. The parish of *Ashborne* has two church-wardens, who are appointed for the parish at large. At the time of granting the above certificate, *J. Warrington* was the only overseer appointed for the township of *Sturston* during that year. There has been generally only one overseer appointed for the township of *Sturston* ; though in some few instances there have been two. There has always been a sufficient number of inhabitants to have appointed two overseers.

Balguy and *Clarke* in support of the order of Sessions. The question is, Whether, there having been but one overseer appointed for the township of *Sturston* at the time, a certificate made by that one be not binding on the township ? or in other words, Whether the township be not estopped from disputing the legality of it in this mode of proceeding ? It was contended below, first, that the churchwardens of the parish of *Ashborne* in which this township is situated, ought to have joined in granting the certificate. That might

(1) It has also been decided that the occupier of a clay pit is rateable for the same. *The King v. Brown*, 8 East 528.

have been necessary under the stat. 43 Eliz. c. 2. s. 1, compared with the certificate act 8 & 9 W. 3. c. 30, if this had been a certificate granted by the parish at large; because by the former statute "the church-wardens of every parish, together with 4, 3, or 2, substantial householders there," are appointed overseers of the poor; and by the latter statute, the certificate is to be "under the hands and seals of the *churchwardens and overseers* of the parish, township, or place, or the major part of them," &c. But this is not the case of an overseer appointed under the statute of Elizabeth, but under the stat. 13 & 14 Car. 2. c. 12, which directs the appointment of overseers only for every township in a parish which is too large to reap the benefit of the stat. 43 Eliz.; and the stat. 8 & 9 W. 3. c. 30, goes on to provide that the certificate shall be under the hands and seals "*of the overseers*, where there are no "*churchwardens(a)*." Now here there were no churchwardens of the township of S., as there can be none appointed for such a district; though there were churchwardens for the parish at large, which contained this and other townships within its limits. But the churchwardens for the parish at large cannot, as such, be within the meaning of the certificate act 8 & 9 W. 3. as applied to a township, though included within the limits of their appointment; for they have nothing to do with the government or maintenance of the poor in such township, and consequently cannot be supposed to have cognizance of the fact which they would be required to certify. Besides, it might so happen that a churchwarden appointed for the whole parish in which the townships of A. and B. were situated, and living in A., might be interested in certifying that a pauper was settled in B. in order to exonerate his own particular township. Whereas the weight due to the truth of a certificate is founded on the presumption that the officers executing it will not certify a fact in their own wrong. Secondly, admitting that an original appointment of one overseer only would be bad, and that in a direct proceeding for that purpose the appointment might be quashed; yet no objection can be taken in this collateral manner to any act done by such single overseer. If two had been originally appointed, and one had died, a certificate signed by the survivor, or any other act done by him, would have been valid. Then how can a foreign parish or township be apprised of the invalidity of the certificate upon the face of it? or how can they take cognizance of an original defect in the appointment of the overseer? To permit the township granting the certificate to take such an objection would be to let them take advantage of their own laches. If they who were most concerned thought proper to acquiesce in a defective appointment, a third and an innocent township ought not to be prejudiced by it. As to all third parties, it is enough that the person acted *de facto* as overseer, and that the certificate was signed by a majority of the existing overseers: the statute of King William requires nothing more. This reasoning is confirmed by the cases as far as they go. In *Rex v. Besland*, 1 Const. 15. S. C., and 1 Burr. 446. in marg., the Court refused to quash an order of justices appointing *one* overseer; because they need not all be appointed by one instrument(b); and *non constat* that others had not been appointed by other orders. In *Rex v. Loxdale*, 1 Burr. 445. 3 Burn's Just. tit. Poor—Overseers (321). S. C., an appointment of five overseers was quashed, being a greater number than was warranted by the stat. 43 Eliz., which Lord Mansfield observed was in a *descending* ratio, 4, 3, or 2, and not the reverse; which he said pointed out to demonstration what the Legislature meant; which was, that the number should not exceed four. These, however, were cases where the validity of the appointment was directly in judgment. But in *Rex v. Wymondham*, 6 Term Rep. 552, the same point arose collaterally upon a ques-

(a) Also by the stat. 17 Geo. 2. c. 38. s. 15. "In every township or place where there are no churchwardens, the overseers alone may act in all respects as churchwardens and overseers may do in other places by virtue of this or any former act."

(b) Vide *Rex v. Morris*, 4 Term Rep. 550, to the same purpose.

tion of settlement. There a certificate had been signed by two churchwardens and four overseers of *W.*; but the case stated, that it had been usual to appoint four churchwardens and eight overseers in that parish, there being several divisions in it, though the poor were maintained by one general rate. An appointment, therefore, of a less number than usual, was certainly invalid. But Lord *Kenyon* said, that if the certificate were signed by a majority of the parish officers *de facto*, as contra-distinguished from such officers *de jure*, it would be valid.

Gibbs and *Torkington*, contra. 1st, The words of the stat. 8 & 9 W. 3. c. 30, are positive, that the certificate shall be made by the churchwardens and overseers, or the major part of them; or where there are no churchwardens, then by the overseers. It matters not, therefore, whether the overseers be appointed under the statute of Elizabeth, or under that of Car. 2.; because the certificate act does not require the concurrence of all these officers as *overseers* merely, in which character the management of the poor is committed to them by the statute of Elizabeth; but it requires their concurrence *qua churchwardens*, as well as overseers: under the certificate act, therefore, it is not necessary that the churchwardens should be overseers. Then there being churchwardens for the whole parish, their jurisdiction must necessarily extend throughout the townships into which it is divided, and they must consequently be churchwardens for every part of it: in which case the certificate appears to be void on the face of it. 2dly, It is clear from the cases referred to, that an appointment of one overseer alone for a township (which is the fact here found), is bad, even under the stat. 13 & 14 Car. 2., and consequently that the certificate in this case not having been made according to the directions of the statute of William, which requires it to be executed by the overseers where there are no churchwardens, (or at least by the major part of them) is absolutely void. But it is contended that no advantage can be taken of the illegality of such appointment in this collateral way: but it would be most strange and incongruous to say, that a person, however illegal and void his appointment to an office, should yet have the power of binding the township by his acts, against perhaps the consent of the major part by whom his appointment may be resisted. The certificated township were not bound to receive the persons named in the certificate unless it were legally executed; and they were bound to look to that at their peril. It cannot be pretended that a certificate given by one who merely acted as overseer without any appointment at all would be of any effect; or if not executed by a majority of the proper officers. Then if the parties interested must inquire of those facts, why not of the legality of the appointment of one: especially where the presumption of law is, that there are more overseers than one.

GROSE, J. The question is, Whether the certificate granted by one overseer can be good? First, considering it as a certificate given by an overseer appointed under the statute 43 Elizabeth, it cannot avail; because the statute of King William, to which it must conform, directs that it shall be made by the churchwardens and overseers, or the major part of them; or where there are no churchwardens, by the overseers: and by the statute of Elizabeth, the churchwardens and not less than two substantial householders, are required to be nominated overseers. Now this certificate was not granted by either one or the other of those descriptions of persons. Then see if it can be supported as a certificate given by a township under an appointment by virtue of the stat. 13 & 14 Car. 2.; for it is of great importance to take care that a certificate which is to be binding on the inhabitants of the township is properly given in the manner prescribed by law. That statute expressly requires, that in every township of any parish which cannot reap the benefit of the stat. 43 Eliz. "there shall yearly be appointed *two or more* overseers," &c. Then if the township claim the benefit of the act to appoint its own overseers, it must adhere to the direction of the act, and appoint not less than two overseers.

And there is a good reason for requiring the concurrence of the proper officers in these instances; because it is a discretionary act which is to bind the inhabitants: and if the proper number of overseers had been appointed, the inhabitants would have had the benefit of their consideration (which the statute intended to give them), whether this were a proper certificate to be granted. Therefore, the stat. of Car. 2, having required that not less than two overseers should be appointed for a township, and the statute of King William having required the certificate to be executed by the overseers where there are no churchwardens, and there having been but one overseer appointed for the township, by whom this certificate was granted, I am of opinion that it was void.

LAWRENCE, J. Two questions have been made, 1st, Whether the churchwardens of the parish at large should have joined in granting the certificate? 2. Whether a certificate made by one overseer of a township, where there is only one appointed, be good? As to the first, there is no necessity for entering into it on this occasion. If there had been, I should have thought that what had been urged by the counsel in support of the order of Sessions was very material. And I believe it has not been usual for the churchwardens of the parish at large to join in granting certificates with the overseers of particular townships within it maintaining their own poor. However, it will be sufficient to determine that question when it necessarily arises, which is not the case here; because I think that this certificate was at any rate bad, having been granted by only one overseer, who was alone appointed for the township of *Sturston*; whereas the stat. 13 & 14 Car. 2, expressly requires two to be appointed for every township; and unless the certificate pursue the statute it is void. For an authority cannot be executed by one, which is given by the statute to more than one. But it is said to have been decided in *Rex v. Wymondham*, 6 Term Rep. 552, that it is sufficient if the certificate be granted by a majority of the churchwardens and overseers *de facto*, though not *de jure*. The case, however, does not go that length. It appeared there, that the certificate had been granted by two churchwardens and 4 overseers, where it had been usual to have 4 of the first and 8 of the latter prior to a certain period when the parish was incorporated with others. It was contended there at the bar, that if there had been an appointment of any other than those four overseers, it must have been void, as not warranted by the stat. 43 Eliz., and therefore the certificate must be taken to have been granted by a majority of the legal officers. In answer to which Lord *Kensyon* observed, that if the legality of their appointment were under consideration, it would be impossible to distinguish between the first and the last, and to say that the four first only were legally appointed. But then he went on to state, that it did not appear that in fact there were twelve parish officers at the time the certificate was granted: but that it would be nugatory to send the case down again to the Sessions to find that fact, as at any rate he thought that the certificate was discharged by the subsequent act of the pauper. Therefore, the conclusion to be drawn from the whole rather is, that in his opinion, if it had been necessary to have had the fact found by the Sessions, and they had returned that there were twelve parish officers at the time, the certificate would have been bad, and advantage might have been taken of the defect in that collateral procedure.

LE BLANC, J. We are called upon to consider the validity of an act done by one *J. W.*, being the only overseer at the time of the township of *Sturston*; and the question is, Whether the act done by him will bind the township? Now the certificate not being executed by any churchwardens can only be good, if at all, under the stat. of Car. 2, which enables overseers to be appointed for townships; the statute of King William enabling a certificate to be granted by the overseers where there are no churchwardens: but as it is not executed by churchwardens and overseers, it cannot be supported with

reference to the stat. of 43 Elizabeth appointing such officers to act for the government of the poor. And I also think the appointment was void, taking it to be made under the stat. 13 & 14 Car. 2.; because that requires at least two overseers to be appointed; and it is not stated that *J. W.* was originally appointed with another overseer, and that such other overseer had died before that time; but that *J. W.* was the only overseer appointed for the township during that year. Therefore, without considering whether it were necessary for the churchwardens of the parish at large to join in the act, at all events this certificate was bad, being only made by one overseer of a township, who had no authority by the act of parliament. It will be sufficient to decide the other question when it becomes necessary to do so. But for the present I think there is considerable weight in the arguments urged against the necessity of the churchwardens of the parish at large joining in the certificate with the overseers of the township. If it were deemed necessary, they would in many instances have clashing interests. Therefore, at present I do not consider that they were such churchwardens whose concurrence in the certificate was required by the stat. 8 & 9 W. 3.

LAWRENCE, J. added that he did not mean to have it understood that he had given it as his opinion that it was necessary for the two overseers to be appointed by the same instrument. The case negatived the appointment of more than one.

Order of Sessions quashed(a).

The King v. Harwood, Clerk.

2 East, 177. Feb. 4, 1802.

Where sufficient appears by the affidavits to draw the merits of an election to a corporate office into question, the Court will grant an information in nature of a *quo warranto*, though the fact of the defendant's usurpation no otherwise appear than by the deponents' swearing to their information and belief that the defendant was admitted a freeman, and sworn and inrolled accordingly; the defendant not denying the fact when called on by the rule to shew cause.

THE defendant was called upon by a rule to shew cause why an information in nature of a *quo warranto* should not be exhibited against him to shew by what authority he claimed to be one of the freemen of the city of *Litchfield*. As the sole question agitated at the bar was, whether there were sufficient evidence of an user or usurpation of the office by the defendant, so much only of the affidavits as bore upon that point are here stated; it having been admitted on his part, that if he had used the office in fact, the merits of the election must be submitted to a jury.

By a charter of *inspezimus* and confirmation of the 16th Car. 2, the bailiffs and citizens of *Litchfield* were incorporated by the name of the bailiffs and citizens of *Litchfield*. The charter ordained, that there should be two bailiffs elected annually from among the citizens, and one-and-twenty citizens elected to be named the brethren of the bailiffs of the said city, which two bailiffs and 21 brethren for the time being should be of the common council. It then gave them a power to make by-laws for the good government of the city, and of all the citizens, officers, &c. brotherhoods, and the several companies of trades, &c. of the inhabitants and residents. The charter also contained a clause, that all who should be admitted freemen of the said city should be sworn in before the bailiffs or one of them to obey all the constitutions and ordinances, &c. and that none should be admitted or continue a

(a) Vide *Rex v. Atkins*, 4 Term Rep. 12. [*The King v. The Inhabitants of St. Margaret, Leicester*, 8 East 332. *The King v. The Inhabitants of Hinckley*, 12 East 361. *The King v. The Inhabitants of All Saints, Derby*, 13 East 143.]

freeman before he had taken the oaths of supremacy and allegiance, &c. and subscribed the declaration, &c. before the bailiffs or one of them. It was also deposed by one who had been an alderman and one of the brethren for 12 years, and who had served the offices of senior and junior bailiff, that there are incorporated within the city eight companies of traders. That he always understood that before a man could be made a *freeman of the said city*, it was necessary that he should first be incorporated or admitted into one of the said companies; and that being so admitted into a company, he had a right and could demand, if duly admitted, to be sworn in a *freeman of the company* wherein he had been admitted *before the bailiffs*, or one of them, *and to be enrolled by the town clerk of the said city; from which time he became a freeman of the said city*, and entitled to the immunities of a freeman, and also to the peculiar privileges of his own company, as the deponent understood and believed. It was also deposed by one of the company of smiths, &c. that at a meeting of the company at which he was present certain persons (amongst whom was the defendant) were proposed to be admitted to the freedom of the company. Then after mentioning several circumstances attending such nomination which went to impeach the regularity of the proceeding, the affidavit continued thus: "That *the deponent understands and believes*, that at such meeting on the 1st of April last, the defendant *Harwood* and others to the number of seventy and upwards, *as he hath heard and believes*, were admitted freemen of the said company, and that they have been since sworn and inrolled accordingly, *as he hath been informed and believes*." The affidavit then set forth the qualifications required for persons to be admitted freemen, none of which the deponent believed were possessed by the defendant and the rest of the persons so admitted. The same facts were sworn to by others of the freemen in the same manner.

Gibbs, Adam, Clarke, Dauncey, and Jervis, shewed cause against the rule, and contended that the prosecutors had not laid before the court sufficient evidence of the defendant's having *usurped* the office of a freeman of the city of *Litchfield* to warrant the granting of the information. No act or claim is stated to have been done or made by the defendant as such freeman: and though it would have been sufficient if the fact of his having been sworn in before the bailiffs had been positively sworn to, yet even that, which was capable of being ascertained with certainty by reference to the corporation books, was only affirmed according to the deponent's information and belief. The person from whom such information was obtained ought to have been brought forward; but even his name is not mentioned: and at least the prosecutors should have shewn that they had made application for an inspection of the corporation books, and had been denied. This manner of swearing, admitting it to be true and uncontradicted at the trial, would not be sufficient evidence to be left to the jury of the fact of the defendant's usurpation of the office; and therefore, it is not enough to put him upon his defence to the issuing of the information now. The prosecutors have been guilty of laches in not having obtained the best evidence which the nature of the thing admitted of; and no inconvenience can ensue from lapse of time in denying the rule for an information till they can come better prepared, the transaction being recent.

The Attorney-General, Erskine, Milles, and Wrottesley, contra, were stopped by

The Court; who said, that though the affidavits were drawn rather loosely, and the fact of the swearing in might have been brought more precisely before them; yet as no answer had been given to it by the defendant, who had had an opportunity of denying it if the information were untrue; and as it was admitted that the merits of the election, if any, were sufficiently brought in question by the affidavits, they thought that at least enough appeared to put the matter in a course of inquiry.

Rule absolute.

The King v. The Sheriff of Surry.

2 East, 181. Feb. 4, 1802.

If the defendant's attorney or his clerk be put in as bail, the plaintiff must except to the bail, and cannot proceed as if the matter were a nullity.

A Rule *nisi* was obtained for setting aside an attachment against the sheriff (in a cause of *Clark v. Pierson*,) for not bringing in the body: and whether the attachment were regular or not depended upon the question, Whether the putting in of the defendant's attorney as bail were or were not a nullity? The plaintiff in the cause having considered it as a nullity, and proceeded accordingly to attach the sheriff.

Mingay and *Marryat* shewed cause against the rule, and contended for the regularity of the attachment. They said, that an attorney had been permitted to be put in as bail only for the purpose of surrendering the principal; *Jackson v. Trinder*, 2 Black. Rep. 1180, but not for the purpose of justifying, or of compelling the plaintiff to except to him, in order to proceed against the sheriff, or to take an assignment of the bail bond. That the rule of Court of Mich. 14 Geo. 2. B. R. was positive, that no attorney should be bail in any action depending in the Court. And on a similar rule in C. D. Mich. 6 Geo. 2, the construction and practice was to consider the putting in of such bail as a nullity. *Fenton v. Ruggles*, 1 Bos. & Pull. 356. *Wallace v. Arrowsmith*, 2 Bos. & Pull. 49.

Espinasse, in support of the rule, relied on *Thompson v. Roubell*, East. 22 Geo. 3, in this Court (a), to shew that though it were a good cause of exception to the bail that one of them was the defendant's attorney; yet that the bail-piece was not a nullity on that account. And

The Court, upon reference to the Master, confirmed the practice to be so in this Court: and were about to make the rule absolute for setting aside the attachment against the sheriff for irregularity; but it appearing that the affidavit on which the rule was obtained was improperly entitled in a cause of such an one and another (b); the Rule was discharged.

In another cause of *Fozall v. Bowerman* on the same day, a rule was made absolute on the authority of the opinion above expressed, for setting aside proceedings on a bail bond for irregularity; the irregularity being, that the attorney's clerk having been put in as one of the bail, the plaintiff considering it as a nullity, without excepting to him, took an assignment of the bail-bond and proceeded accordingly.

Park and *Reader* were engaged on opposite sides: but *The Court* said, the practice was too well settled to admit of dispute: the plaintiff must except to the bail, and cannot consider the matter as a nullity (1).

(a) Cited in Dougl. 466. a.

(b) Vide *Fores v. Diemer*, 7 Term Rep. 661. The christian and surnames of the parties must be inserted in the title of an affidavit. [Vide *Folger & al. v. Hoogland*, 5 Johns. 235.]

(1) Vide *Bell v. Gate*, 1 Taun. 162. *Richie v. Gilbert*, and *Cakish v. Ross*, 1 Taun. 164, in notis.

Cunliff and Malby his Wife, and Others, (which said Malby, &c. are Administratrixes of J. Houghton, deceased,) v. Sefton and Others.

2 East, 188. Feb. 4, 1802.

Where in an action on a bond, evidence was offered that diligent inquiry had been made after one of the subscribing witnesses at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him : held sufficient to let in proof of the hand-writing of the other subscribing witness, who had since become interested as administratrix to the obligee, and was a plaintiff on the record.

UPON a rule nisi for setting aside a nonsuit in this cause, which stood over from last Michaelmas term, *Chambre, J.*, before whom it was tried at the last Summer assizes at Lancaster, reported that it was an action on a bond given by the defendants to the intestate, dated 31st of February 1795, for 600*l.*, to which *non est factum* was pleaded. That the bond when produced appeared to be witnessed by *Richard Bate*, and by *Alice Houghton*, one of the plaintiffs : and to prove the execution of it the following evidence was offered, viz. That the plaintiffs had taken out a subpoena for *Richard Bate*, one of the subscribing witnesses ; and that for the purpose of serving him with it, diligent inquiry was made at the place where the obligors and the obligee lived, without having been able to obtain any intelligence of such a person ; who he was, or where he lived, or any other circumstance relating to him. That the defendants had acknowledged the debt, and made a calculation of what was due for principal and interest, which the plaintiffs offered to prove by letters of correspondence : and as *Alice Houghton*, the other subscribing witness, by reason of her interest as administratrix and plaintiff, could not be produced as a witness, it was offered to perfect the proof by evidence of her hand-writing. The learned Judge, upon the authority of *Abbot v. Plumbe*, Dougl. 216, thought himself precluded from receiving the evidence of acknowledgment as proof of the execution of the bond. He also thought that the inquiry after *Richard Bate* was too slight a foundation for directing the jury to find for the plaintiff upon the rest of the evidence, without producing *Bate* as a witness, or proving his hand-writing. Not having, however, any doubt of the justice of the demand, he wished to have reserved the point for the determination of this Court upon a case : but there being no person to consent on the part of the defendants, the learned Judge directed a nonsuit, with liberty to the plaintiffs to apply to this Court to set it aside.

Yates now shewed cause against the rule. The case of *Abbot v. Plumbe*, Dougl. 216, is an express authority that an acknowledgment of the bond by the obligors will not supply the want of proof of the execution of it by one of the subscribing witnesses ; and the only cases in which evidence of the hand-writing of such witnesses has been holden sufficient were when they were dead, *Barnes v. Trompowsky*, 7 Term Rep. 266, or lived beyond sea, *Ibid.*, or had become infamous, *Jones v. Mason*, 2 Str. 833, or were parties interested in the suit, *Godfrey v. Norris*, 1 Str. 34, and *Goss v. Tracy*, 1 P. Wms. 288. This latter exception is indeed applicable to one of the subscribing witnesses ; but that will not take away the necessity of calling the other, or, in case of his death, or absence beyond sea, &c. (which the plaintiffs were bound to make out) proving his hand-writing. Now here the evidence of inquiry after *Richard Bate* was not satisfactory to the learned Judge ; and therefore it does not fall within the dictum of Lord Kenyon in *Barnes v. Trompowsky*. It is not sufficient merely to inquire for the subscribing witness at the places of residence of the parties, it not even appearing that the bond had been executed there. But whether or not reasonable diligence had been used to find the

witness was a question for the opinion of the Judge, and he determined in the negative.

The Attorney-General and Carr, contra. The witness not having been heard of for nearly seven years, and there being no trace to be discovered of such a person, the inquiry made for him at the places of abode of the respective parties was using the best diligence which the nature of the case would admit of; and the search could scarcely have been extended with any prospect of success without some clue to go by, unless perhaps by advertisements in the public papers; which have never been holden to be necessary. The period of seven years absence unheard of is a sufficient defence to a prosecution for bigamy(a); and was therefore considered by the Legislature as affording a reasonable presumption of the death of the party. The same presumption is made in other cases, 1 Andr. 20, pl. 42. *Thorne v. Rolfe*, Dy. 184, pl. 65, S. C. Benl. 86, pl. 131. This case ranges itself within the principle of the exceptions laid down by Lord Kenyon in *Barnes v. Trompowsky*; where reasonable inquiry has been made after a witness without success, there his hand-writing, if known, shall be proved; but even that is impossible, if no account can be obtained who the witness was. In that case, no inquiry whatever had been made after the witness. Then, if the non-production of *Richard Bate* were sufficiently accounted for, and the evidence sufficient to dispense with the proof of his hand-writing, the rest of the evidence was as full and satisfactory as the case would admit of; namely, proof of the hand-writing of the other subscribing witness, who had become interested in the bond after her attestation, and of the acknowledgment of the bond by the obligors, the defendants. This latter alone was holden sufficient in *Swire v. Bell*, 5 Term Rep. 371, where from the circumstance of the subscribing witness being interested at the time of the attestation, no other medium of proof was attainable by the obligee. The case of *Abbot v. Plumbe*, Dougl. 216, does not go the length of excluding such testimony in all cases, but only where the subscribing witnesses themselves or evidence of their hand-writing may be procured; and that case too only goes to reject the admission of the bankrupt, who was not a party to the record. But exceptions have been admitted to the general rule; as in *Bowles v. Langworthy*, 5 Term Rep. 366, where a bill of sale was produced by the defendant himself, and relied on by him on an examination before commissioners of bankrupt; which was given in evidence in an action of trover by the assignees of the bankrupt against the defendant for the goods conveyed by such bill of sale. So in *Laing v. Rathe*, 2 Bos. & Pull. 85, judgment was entered up on an old warrant of attorney without an affidavit of the subscribing witness, who could not be procured; upon proof of the defendant's agreement that it should be so done.

GROSE, J. The general principle of evidence is clear, that the best evidence which the nature of the case will admit of must be given. Then apply that to the present case: here is a bond executed, nobody knows where, and attested by a witness, of whom nothing appears to lead to a discovery who he was, or where he lived. But it was known where the parties to the bond lived; and there it is stated that diligent inquiry was made after the subscribing witness, and no account could be obtained of him. The bond itself is dated in February 1795, and the obligee is since dead. I do not see what the plaintiff could have done more than they have. Then if they have used due diligence without effect, that will let them in to secondary evidence. It is plain from the report that the learned Judge was not satisfied with the first impression of his mind, that the evidence offered ought not to have been received; because he reserved the point, and referred it to our opinion: and upon more mature consideration we think that the evidence offered was sufficient to en-

title the plaintiffs to recover. I form this opinion with reference to what is daily passing in the world. The frequency of written instruments in modern times has made persons less careful than they used to be in the selection of witnesses to their attestation. It has occurred to me to know that persons unknown to the parties, such as waiters at a tavern, have been called in to attest instruments of the most important kind, even wills; where the parties had no previous knowledge of them, nor even were apprized that they bore the names by which they attested the execution. The difficulty, therefore, which has occurred in this case can be no matter of surprize. On the whole, I think the nonsuit ought to be set aside; and possibly the plaintiffs may, in the mean time, be able to procure some intelligence of the subscribing witness.

LAWRENCE, J. It is now admitted as a general rule, that proof of the acknowledgment of a defendant is not sufficient in an action on a bond without calling the subscribing witness. The only question now is on that part of the report of the learned Judge, which states that he was not satisfied that sufficient inquiry had been made after *Richard Bate*, one of the subscribing witnesses, in order to let in the proof of the hand-writing of the other subscribing witness, who has since become one of the parties interested. Now no doubt that a subscribing witness's hand-writing may be proved, if diligent inquiry have been made after him, and he cannot be found. Then the question is, Whether it be not sufficient to inquire after a witness whom nobody knows at the place where the obligors and obligee lived? It is stated, that diligent inquiry was made after the witness there, but without success: then where else were the parties to inquire? It does seem that they have done every thing that could be expected of them; and if so, I think they ought to have been let into the secondary evidence offered.

LE BLANC, J. Inquiry was made for the subscribing witness at the only place where it was probable to find or hear of him. The only other step the parties could have taken was to advertise for him in the public papers: and unless the Court should hold that necessary to be done in all these cases, I think the plaintiffs have made all the inquiry which could reasonably be required of them.

Rule absolute(1)(2),

The King v. The Inhabitants of Mellor.

2 East, 189. Feb. 6, 1802.

A contract for a *standing place* in another's mill for a carding machine (the party's own property) which was fastened to the floor and the roof, for the purpose of being worked by the steam engine of the mill; for which the party was to give 20*l.* a year, with liberty to quit on three months' notice; is not a taking of a tenement; but a mere licence to use the machinery of the mill; and therefore no settlement can be derived under it.

TWO justices by an order removed *John Turner*, his wife and children by name, from the township of *Bramhall* in the county of *Chester* to the township of *Mellor* in the county of *Derby*. The Sessions on appeal confirmed the order, subject to the opinion of this Court on the following case:

The pauper, being legally settled in *Mellor*, took a house in *Stockport* in the county of *Chester*, of the value of 5*l.* a-year, which he occupied for more

(1) Vide editor's note to *Call v. Dunning*, 4 East 55.

(2) [The cases both English and American, upon the subject of the necessity of giving proof by attesting witnesses, and the circumstances which will dispense with their production or with proof of their hand-writing, are all collected and commented upon in the 7th American Edition of Mr. *Starkie's* Treatise on Evidence, vol. 1, from p. 371 to p. 383, and the very full notes by the editors. The case in the text, and that of *Call v. Dunning*, 4 East, 55, will be there found noticed.—W.]

than forty days : and also took from the owner of a mill in *Stockport*, worked by a steam engine, a *standing-place in a room for a carding machine* of his own, which was worked by the machinery of the steam engine, and fastened to the floor, and the roof of the room. He was to pay his landlord 20*l.* a-year ; and agreed with him that each should give the other three months notice to quit. He occupied this at the same time with the house for more than forty days. There were other tenants who had carding machines in the same room upon similar terms ; and they, as well as the owner of the mill, were respectively furnished with keys to it. The owner's key was a master-key to all the rooms in the mill.

The Attorney-General and *Littledale*, in support of the order of Sessions, maintained, that " a standing-place in a room for a carding machine " could not be considered as a tenement, the occupation of which can give a settlement ; being no part of the room itself, though fastened by temporary fastenings to the floor ; and being nothing more than a mere personal liberty to use a portable piece of machinery in a particular place (as the very name imported) in order for the party to avail himself of the fixed machinery of the mill to facilitate his work. There was no letting of any thing fixed to the freehold ; but a mere temporary licence to attach something of the party's own to what was so fixed. No ejectment could have been brought for such standing-place, any more than for a seat at a theatre which the party obtains a licence to use during the season : but a tenement must be something of the realty, for which an ejectment will lie ; and of which the sheriff may deliver possession upon a writ of *habere facias possessionem*. This case falls directly within the principle of the decisions in *Rex v. Dodderhill*, 8 Term Rep. 449, and *Rex v. Tardebigg(a)*. In the former, the renting by a needle-maker of two out of six *pointing-places* in another's mill was holden not to be the taking of a tenement within the statute ; though the machinery there used was the mill-owner's, and part of the thing let ; which made that case, if any thing, stronger than the present in favour of the settlement. It is probable that the *pointing-places* (which were described as frames of wood supporting spindles on which grinding-stones turned with great velocity by means of leathern straps communicating with the great wheel of the mill) were fastened in some manner to the floor, from the way in which they were worked : but in *R. v. Tardebigg*, the *runner* (rented also by a needle-maker) was expressly stated to be a piece of machinery screwed down to the floor ; and yet it was holden not to be a tenement, the renting of which, though in conjunction with the exclusive use of the room in another's mill, would give a settlement. Lord *Kenyon* said, that the contract was in effect no more than a licence to use a particular part of the machinery of a mill, and was no more a taking of a tenement than if a man contracted to pound in a certain mortar, or use a particular grinding-stone in a mill. This is not like the case of *Rex v. Whitechapel*, Hil. 26 Geo. 3. 2 Const. 154. pl. 194 ; for that was the taking of the room itself, though to be used for a particular purpose and at certain times.

Erskine, *Balguy*, and *Hill*, contra, endeavoured to distinguish this from the cases of *R. v. Dodderhill*, 8 Term Rep. 449, and *R. v. Tardebigg(b)* on the ground, that in those cases the takings were of the particular pieces of machinery called the *runners*, and the *pointing-places*, which were mere chattels, and no part of the mill itself : whereas here the taking is a *standing-place* in the room of the mill, which is necessarily a taking of part of the mill itself though for a particular purpose, namely, for the purpose of putting up in such room a machine to be worked by means of the mill-wheel. The carding machine could not have been the subject-matter of the letting, because that was the pauper's own ; the only thing, therefore, which could be let was the *place in the room* where it was to be fix-

ed: the taking therefore was of that part of the tenement itself, and not of the machinery, as in the former cases. Then the particular use which was to be made of the part of the room so taken cannot vary the effect of the contract of letting. The use of a tenement is more or less limited in most cases: that was no objection in *Rex v. Whitechapel*, 4 Term Rep. 671, to the gaining of a settlement: and in *R. v. Tardebigg*, *Lawrence, J.* distinguished that from the *Whitechapel* case, because it was not stated that the runner was in the packeting-room which was appropriated to the pauper's use. [*Lawrence, J.* That observation was made by me in answer to an argument urged at the bar, that as the value of the sitting-room was enhanced in the one case by the use of the furniture and the fire which was to be provided by the owner, so in the other the value of the packeting-room be enhanced by that of the use of the runner. But I did not mean to give any opinion, that supposing the runner had been found to be placed in the packeting-room, the respective values of each, which were distinctly found, could be added together, and applied to the packeting-room alone.] Here the value of the thing let, which was part of the room itself, is sufficient to confer the settlement. The terms of the contract also shew that the thing-let was the room and not the machinery; for there was to be three months to quit respectively: which could not apply to the machine, that being the pauper's own property; and, shews that the parties intended to contract for the use of the freehold itself. Suppose one having furniture of his own took an apartment for the express purpose of placing it there; that could not be considered as any other than a contract for the room itself, and not merely a personal license to place the furniture there. This case comes directly within the principle of *Rex v. Tolpuddle*, 4 Term Rep. 671, and that class of cases. The taking of so many cows cannot be any other than a mere contract for personal chattels; but if the taking be of cows to be fed in certain pastures, that has been holden to be the taking of a tenement; being in effect a renting of the growing produce of the pasture, to be taken, as lord *Kenyon* said, by the mouths of the cows. So here, though the taking of a moveable machine will not give a settlement, yet if the contract be for a certain part of the freehold for the purpose of placing and using the machine there, the legal possession of the freehold passes to such special occupier, as much as if it had been a general taking. In *R. v. Piddletrenthide*, 3 Term Rep. 772, the taking of a rabbit warren was deemed to confer a settlement, although it was expressly found in the case that the pauper had no right in the soil, except that of entering upon and killing the rabbits there; the landlord constantly depasturing the same, and ploughing some part thereof. *Buller, J.* there said, that the true question was, Whether the contract were to receive profits out of the use of the land. Now here the profit was derived out of the use of the freehold as much as in that case.

GROSE, J. The question is, Whether what the pauper contracted for were a tenement? The magistrates state it to be a *standing-place* in a room in a mill, for the purpose of placing there a carding machine of his own, which was to be worked by means of the general machinery of the mill. Now what is that more or less than contracting for a liberty to go and stand there for the purpose of working at his trade? It has been attempted to distinguish this case from those of *Dodderhill* and *Tardebigg*, which are admitted to have been properly decided: but I have listened in vain for any solid distinction to be shewn between them: and we must take care not to give way to refined and subtle distinctions on these subjects, which at last leave the magistrates below no clear rule to go by. Therefore, without entering into any further reasoning on the subject, which will only furnish fresh arguments for doubts on future occasions, I think this was a contract for nothing more than a liberty for the pauper to stand and work his machine in a room of the mill; and that it conferred no settlement upon him.

LAWRENCE, J. This case is governed by those of *R. v. Dodderhill* and *R.*

v. *Tardebigg*, from which it had been endeavoured to distinguish it by saying that those were only licenses to use certain machines belonging to the owners of the mills; whereas this is a hiring of part of the mill itself; because it cannot be supposed that the pauper contracted for a licence to use his own machine. But it is to be observed, that the contract here is not pretended to be for the use of the pauper's own machine, but a license to make use of the steam engine of the mill, by applying to it his own machine. Now what difference can there be between a licence to use another's machine, and a licence to apply the party's own machine to the machinery of another's mill? but it is said, that the pauper contracted for the standing-place in the room where the machine was to be put. To be sure, he must have a place to stand and work the machine, otherwise the contract was absurd and nugatory; but how does that differ from a general licence for him to use the machinery there? Therefore, on this plain ground, that the contract was for a mere licence for the pauper to use the machinery of the mill, and not a letting of any part of the mill itself, I am of opinion that no settlement was gained in *Stockport*.

LE BLANC, J. The substance of the contract was for the use of the machinery, and not a hiring of any part of the room in the mill. It was a hiring of the use of the mill-owner's machinery, as in the other cases referred to; with this difference, that instead of using the owner's machine, he was to apply his own machine to the moving power of the mill, in order to enable him to work it with facility. But whether he contracted for the use of the mill-owner's machinery directly, or by the intervention of some other machine of his own applied to the other, is exactly the same thing.

Order of Sessions confirmed(a).

The King v. Picton.

2 East, 195. Feb. 8, 1802.

If the convicting magistrate give a proper date to the time of the conviction upon the face of it, and afterwards add an impossible date to the time when he set his hand and seal to the conviction (being before the offence committed), the latter may be rejected as surplusage. It is enough that the conviction sets forth that the witness was examined on oath, without stating that the magistrate had authority to administer the oath.

A CONVICTION on the game laws removed into this court by *certiorari*, was as follows:

(*Surry*.) Be it remembered, that on the 16th of *September*, in the 41 Geo. 3, &c. at, &c. *W. D. of, &c.* came before me *J. B.* one of the justices, &c. and then and there gave me the said justice to be informed, that one *Cesar Picton of, &c.* within three months last past, to wit, on the 16th of this same month of *September*, in the said 41st year, &c. the said *Cesar Picton* not having then lands or tenements, &c. (negating the qualifications in the statute 22 & 23 Car. 2. c. 25.) did, at, &c. keep and use a certain gun to kill and destroy the game, against the form of the statute, &c.; whereupon the said *C. P.* afterwards, to wit, on the same 16th day of *September*, in the 41st year, &c. at, &c. had notice of the said information and of the offence therein charged upon him as aforesaid, and was then and there by me the said justice in due manner summoned to appear before me the said justice at, &c. to make his defence to the said charge contained in the information aforesaid. And

(a) Vide *Rex v. The Inhabitants of Londonhorpe*, 6 Term Rep. 377, where the Court held, that the value of a post wind-mill erected by a tenant on land rented by him, (which land in itself was under the value of 10*l.* per annum,) could not be taken into the account so as to raise the annual value above that sum; it being a mere personal chattel, not fixed to the freehold, which the tenant was at liberty to remove at the end of his term, and therefore no tenement.

thereupon afterwards, *viz.* on the 26th of *September*, in the 41st year, &c. at, &c. he the said *C. P.* being duly summoned as aforesaid in this behalf before me the said justice appeareth and is present, in order to make his defence against the said charge, &c., and having heard the same, he the said *C. P.* is asked by me the said justice if he can say anything why he should not be convicted of the premises above charged upon him in form aforesaid; who pleadeth, that he is not guilty of the said offence. Whereupon I the said justice, at the same time and place, *viz.* on the said 26th of *September*, in the year aforesaid, at, &c. do proceed to examine into the truth of the said complaint contained in the said information in the presence and hearing of the said *C. P.* And thereupon one credible witness, to wit, *J. C.* of, &c. cometh before me the said justice, and before me the said justice upon his oath, &c. by me the said justice administered, in the presence and hearing of the said *C. P.* deposeth, &c. that the said *C. P.* on the said 16th day of *September*, in the year aforesaid, at, &c. did keep and use a certain gun to kill and destroy the game. (And then proceeded to negative severally the defendant's qualifications according to knowledge or belief.) And the said *C. P.* although called upon for that purpose, doth not prove that he was qualified to keep and use the said gun for the purpose aforesaid by any of the means herein before-mentioned; nor shew any reason to me the said justice why he should not be convicted of the said offence: nor does he offer any evidence whatsoever before me, or require time for the production thereof: and thereupon I the said justice do adjudge, that the said *C. P.* was and is unqualified, and guilty of the offence aforesaid. And therefore the said *C. P.* on the said 26th of *September*, in the year aforesaid, at, &c. before me the same justice, by the oath of the witness aforesaid, according to the form of the statute, &c. is convicted thereof; and for his offence aforesaid hath forfeited 5*l.* to be distributed as the statute, &c. directs. In witness whereof, I the said justice to this present record of the conviction aforesaid have set my hand and seal at, &c. the 4th day of November, in the year aforesaid.

J. B. (L. S.)

Manley took several objections to the conviction, the principal of which were, 1st, that the conviction was dated on the 4th of November, in the year aforesaid, which by reference must be taken to mean the 41 Geo. 3, and therefore before the offence committed, which was not till the 16th of *September* following. *R. v. Kent*, 2 Ld. Ray. 1546. And this cannot be rejected as surplusage, because the time of the conviction, as well as of the offence, ought to appear. *Rex v. Pullen*, Salk. 369. 2dly, It is not stated that the magistrate had jurisdiction to administer the oath.

The Court said, that as to the first objection, it was expressly stated that the offence was committed on the 16th of *September*, 41 Geo. 3, and that the magistrate, after summoning the defendant and examining the evidence, &c. on the 26th of the same *September*, convicted the defendant of the offence. What follows, therefore, as to the date of setting his hand and seal is insensible, and may be rejected as surplusage. That it was immaterial when he put his hand and seal in point of form to the conviction. That as to the other objection, the conviction was in the common form in which many others were drawn. The act of parliament gives the magistrate authority to administer the oath in that respect.

Marryat was to have argued in support of the conviction.

Conviction affirmed.

The King v. The Inhabitants of Minworth.

2 East, 198. Feb. 6, 1802.

Renting a dairy (including the cows and their pasture) at above 10*l.* a-year in value, will not confer a settlement, if the annual value of the lands on which the cows were to be depastured were under 10*l.*

TWO justices by an order removed *James Field*, his wife and children by name, from the township of *Minworth* in the county of *Warwick* to the township of *Worley Wigorne* in the county of *Worcester*. The Sessions on appeal quashed the order, subject to the opinion of this Court on the following case :

The pauper, being settled in *Worley Wigorne*, afterwards rented, under a verbal agreement from *Lady-day* 1800, till six weeks after *Michaelmas* 1800, two cows, at the rate of five shillings a cow per week, of *J. Griffiths*, who was the tenant and occupier of certain lands in *Minworth*. It was also agreed between the parties, that the owner of the cows should feed and support them; and for that purpose such cows should feed and depasture in the lands of *Griffiths* called the *Two Pixalls* and *Top Ropes*, and also in certain other lands called the *Lower Ropes* and *Minworth Field*, after the said last-mentioned lands should be mown: all of which lands were in *Minworth*; but the lands on which the said cows were so depastured were not of the annual value of 10*l.* *Griffiths* was not to feed any other cattle in any of the above-mentioned lands whilst the same were depastured with the cows so rented by the pauper. The contract continued in force for the space above mentioned, during the whole of which time the pauper resided in *Minworth*.

Erskine and *Reader*, in support of the order of Sessions, contended that the renting the dairy in *Minworth* gave the pauper a settlement there, although the value of the lands on which the cows were depastured did not amount to 10*l. per annum*. The cases of *Rex v. Piddletrenthide*, 3 Term Rep. 772, and *Rex v. Tolpuddle*, 4 Term Rep. 671, must govern the present. In the latter, which was the case of renting a dairy, the annual value of the land did not appear(a). *Grose, J.* It was taken for granted there, that the value of the land was 10*l. a-year*; and the attention of the Court was not called to any other view of the case.] At any rate, in the former case of the rabbit-warren, the value of the land was well known to be little or nothing, and that the sole profit was derived from the rabbits. Besides, it has been always holden sufficient to confer a settlement, that the annual value of 10*l.* has arisen from something connected with the realty, though no part thereof; as in the *Whitechapel* case, Hil. 26 Geo. 3. 2 Const. 154. pl. 194, where the furniture and firing found in the room contributed to make up the requisite value of the tenement. So in *R. v. North Bedburn*, E. 24 Geo. 3. 2. Const. 155, a land sale colliery leased to the pauper was holden to be a tenement of sufficient value to confer a settlement, although the value of the land itself, apart from the stock of horses, gins, ropes, and other things necessary for the working it, was affirmed to be under the annual value of 10*l.*

Clarke, contra, was stopped by the Court.

GROSE, J. This case is very plain. Unless the pauper occupied a tenement of 10*l. a-year* value he could gain no settlement. And that fact is expressly negatived; for it is stated that he rented two cows, which were to be fed on particular lands, and that those lands were not of the annual value of

(a) That fact was not stated in the case; but it appears by a note in p. 672, of the report, that to a question put by the Court to the bar, it was admitted that the annual value of the land in that case was more than 10*l.* This note was referred to by *Clarke*, who was to have argued against the order of Sessions upon the present occasion.

10*l.* That makes an end of the question. The principle on which the renting of dairies (as it is called) has been holden to confer a settlement is, that in truth and effect it is a contract for a certain interest in the land to be enjoyed in a particular manner: that alone constitutes it the taking of a tenement: and in each of the cases which have been decided on that ground it was understood that the land itself was of the requisite value. Then in analogy to all the cases in *pari materia* we are bound to say, that the pauper did not gain a settlement by the renting and occupation in question.

LAWRENCE, J. In the case of *The King v. Tolpuddle*, the ground on which the Court went was, that the contract there stated gave the pauper a right to take the produce of the land by the mouths of the cattle; and that it was the same as if he had rented so much pasture for his cows to the value of 10*l.* a-year. The value of the cows hired was never taken into consideration as forming part of the value of the tenement. Nothing can be concluded against this from the case of *The King v. North Bedburn*. For it seemed to be the object of one of the parties at the Sessions to distinguish between the value of the land and of the things leased with the land; and the Sessions let them into that evidence (being parol evidence of the lease which the lessor had refused to shew, and which was not then produced); and this Court held that the Sessions had done right. That rather shews that the distinction was considered to be material: but it was not established in point of fact. The case of the warren falls under a different consideration: the produce of a warren is the rabbits as much as the produce of a fishery is the fish. But that is not like a contract for the hire of cows.

LE BLANC, J. In the former cases the Court held that the renting of a dairy with land which was of the annual value of 10*l.* was the same as renting land of that value, the produce whereof was to be taken by the cows(1). But that is not like a contract for the hire of cows with the use of land under the value of 10*l.* a-year. With respect to other cases, where the value of land has been raised to that amount by things erected upon it, the Court has resisted the attempt to separate the value of the land from that of the erections attached to it. Such seems to have been the case in *R. v. North Bedburn*. But that differs greatly from the present case, where the renting is of cows which are not annexed to the land.

Order of Sessions quashed.

The King v. Macleod.

2 East, 202. Feb. 6, 1802.

A defendant in a crown prosecution cannot carry down the *nisi prius* record to trial by proviso.

THE defendant was in custody in execution of several sentences for misdemeanors, of which he had been convicted; and had pleaded not guilty to an information filed against him by the Attorney-General for a libel, in which notice of trial had been given on the part of the Crown to the defendant several terms ago, which had been renewed at several intermediate sittings. Whereupon on a former day of this term

Scott moved for a rule (in substance) calling on Mr. Attorney-General to shew cause why a day should not be peremptorily fixed for the trial of this information. This motion was grounded on a long affidavit of the defendant, stating the several stages of the proceedings which had hitherto been had, and the different notices of trial given; and complaining of the hardship, ex-

(1) Vide *The King v. Hollington*, 3 East 113. *The King v. The Inhabitants of Stoke-upon-Trent*, 10 East 496.

pence, and vexation which he had thereby sustained. And the rule was framed upon what is stated to have been said by the Court in the report in 6 Mod. 247, in the case of *The Queen v. Sir Jacob Banks*; "that in all indictments or informations here, &c. the defendant has no other way to hasten "on his trial but by application to the Court; who, upon hearing the reasons "of Mr. Attorney-General, will as they see occasion, either give him further "time, or fix him a day peremptorily for the trial, or give the defendant leave "to bring it on himself." And at the same time Scott said, there might be great doubt as to the authority of the decision in *Rez v. Dyde*, 7 Term Rep. 661, that a defendant could not carry down the *nisi prius* record to trial by proviso in a case where the King was party, which he said was not warranted by the authorities referred to in the report of the case.

The Court, (after consulting the officers of the crown-office) said, that there was no instance of such a rule as that now prayed for having ever been granted. That what was said in the report of *Rez v. Sir Jacob Banks* in 6 Mod. must be understood as referring to trials at bar. That it did not occur to them how this Court could exercise a jurisdiction over the Judge presiding in the Court at *nisi prius*, before whom the *nisi prius* record would be, so as to govern his discretion as to the particular day when the information in question should be tried. That if the defendant first shewed any ground to the Court for directing a trial at bar, it would be afterwards competent to him to move the Court to fix a particular day for it, as they might regulate the method of their own proceedings. But that if the defendant were not inclined to adopt this, which occurred to them as the only mode by which he could obtain the object which he pressed for; and his counsel really meant to contend that the point ruled in the case of *The King v. Dyde* was not law, (which was however recommended to his re-consideration) they would grant a rule to shew cause why the defendant should not be at liberty to proceed to trial by proviso at the sittings at *nisi prius* after this term.

The defendant's counsel assenting to accept the rule in this form, it was accordingly granted.

The Attorney-General and Garrow now shewed cause against the rule; and after going at length into the reasons which had induced the postponement of the trial from time to time, some of which had originated with the defendant himself, and all of them accounting satisfactorily for the delay which had arisen, so as to do away any imputation of wilfulness, or intention to harrass the defendant; they were proceeding to support the authority of the decision in *Rez v. Dyde*, which was in point against the present application; when the Court said, that it lay upon the defendant's counsel to disprove that authority. They therefore concluded by observing shortly, that the very report referred to in 6 Mod. 247, of *Sir Jacob Banks's* case(a), stated that there could not be a trial by proviso in the King's case, because there could be no laches imputed to him: and that the rest of what was there stated had already received an answer from the Court. That the authority of *Rez v. Dyde* was also supported by 2 Hawk. c. 41, s. 10, as well as by 2 Inst. 424.

Scott in support of the rule (being desired by the Court to confine himself to the question, whether they had authority to permit the defendant to carry down the record to trial by proviso, in a case where the Crown was prosecutor), contended, that an information by the Attorney-General *ex officio*, was, when filed, subjected to the general jurisdiction of the Court in every respect, the same as any other proceeding; and that it was part of the essential constitution of the Court that they should have power to direct the form and manner of proceeding to trial in such way as would best promote the ends of justice, and prevent oppression on the defendant. In 3 Com. Dig. *Information*, D. 4. it appears, that an information filed by the Attorney-General may be

(a) Reported also in 2 Ld. Raym. 1082. 1 Salk. 652. and 11 Mod. 33.

quashed by the Court upon cause shewn; for which is cited *Fountain's case*, 1 Sid. 152. It follows then, that if the Court may quash the information altogether, they may direct when it shall be tried in the same manner as in other informations at the suit of private prosecutors. The case of *R. v. Dyde*, 7 Term Rep. 661, was the first direct judgment on the point: it passed without argument, and is not warranted by any precedent. The only authorities referred to are those of Sir *Jacob Banks's case*, 6 Mod. 247, and 2 Inst. 424. In the first, the only question before the Court was, Whether there should be a new trial, the first having been had by surprize on the prosecutor: which was accordingly granted. The indictment there, which was originally found at the Sessions, had been removed thither by *certiorari* at the instance of the prosecutor, who was a private person, and who had made no default before trial. Now, in no case can a defendant carry down a record to trial by proviso, till the prosecutor or plaintiff has made default at one trial. Whatever therefore was said as to the inability of a defendant to do this in a prosecution at the suit of the Crown was an *obiter dictum*. But if that were entitled to consideration, the same consideration is also due to what was also said, that the Court upon application of the defendant would, if they saw occasion, fix him a day peremptorily for the trial, or give him leave to bring it on himself. Then as to the other authority relied on in 2 Inst. 424, it has no relation whatever to trials by proviso; but merely states that a writ of *nisi prius* shall not be granted where the King is party, without a special warrant from him, or the assent of his Attorney-General.

GROSE, J. The trial by proviso(a) it is well known was given in order

(a) The trial by proviso takes its name from a clause in the *distringas*, which provides, that if two writs come to the sheriff he shall only execute and return one of them. Vide 2 Tidd's Prac. 686, cites 2 Lit. P. R. 612, 617, that is, if two writs come to the sheriff in the same cause, (the one being supposed to be delivered on the part of the plaintiff, the other on the part of the defendant,) he shall summon but one jury for the trial of the issue. *Trial per Pais*, 71. But the trial shall in all cases be by the plaintiff's record, if he enter it in time. Tidd's Prac. ib. In no cases is the trial by proviso grantable to the defendant unless there has been laches in the plaintiff, Dy. 215, b. Staunf. P. C. 155, except in cases where the defendant is an actor, as in replevin, prohibition, and quære impedit. *Ibid.* and 2 Hawk. ch. 41. s. 10. I do not find it any where stated how soon after the stat. of Westm. 2. c. 80. (13 Ed. 1.), which gave the writ of *nisi prius*, as it has been long called, (2 Inst. 424,) the practice of trial by proviso prevailed. By the stat. 2 Ed. 3. c. 16, it was enacted, that inquests in plea of land should be taken as well at the request of the tenant as of the demandant. In the 8 H. 6, it was resolved by the court; on complaint of the defendant, that the plaintiff had kept back the writ so that the sheriff could not serve the jury with process, and both of them should have writs, with a proviso that the sheriff should only execute one of them. 8 Hen. 6. Bro. Process; pl. 56. The practice is also recognized in several cases in the year-books. Temp. Hen. 7, cited in Staunford's P. C. 155, and by the stat. 7 & 8 W. 3. c. 32, which enacts, "That if any defendant or tenant in any action depending in any of the said courts (i. e. of *Westminster*), shall be minded to bring to trial any issue joined against him, when by the course in any of the said courts he may lawfully do the same by proviso; such defendant or tenant shall or may, of the issuable term next preceding such intended trial to be had at the next assizes, sue out a new *venire facias* to the sheriff in form aforesaid by *proviso*," &c. All the books before referred to which touch on that branch of the subject which was in judgment in the principal case, and other authorities, agree that there can be no trial by proviso against the king, (unless by his special warrant, or the assent of his attorney-general, Fitz. B. R. 241.) because no laches can be imputed to him. Whether this rule applies as well to private prosecutors is not universally agreed. An anonymous case in 1 Sid. 316, says, that the court held that the defendant in an indictment for perjury might try the issue by proviso, if the prosecutor would not try it. And such I am informed is the prevailing practice in the Crown-office in the case of private prosecutors making one default in not proceeding to trial. For in truth, the king is no otherwise interested in the indictment than in point of common justice. 3 Salk. 362. Yet it is to be observed, that the general authorities referred to speak in general terms of there being no trial by proviso where the king is party, without distinguishing between public and private prosecutions. To which may be added, 1 Ventr. 315, and 1 Keb. 198, and it was once doubted in the case of a *quis tam* information, because the queen was *quodam modo* a party to the suit. 2 Leon. 110. Perhaps it may be thought that independent of any question which may arise upon the ancient practice of the court since the stat. of Westm. 2. in this respect, the present practice of the Crown-of-

to prevent defendants from being oppressed by the laches of plaintiffs; and if the defendant could have shewn himself entitled to it, we should not withhold from him his right; for Judges as well all others are interested that every thing should be done according to law: but if the law does not authorize us to grant what is prayed for, we cannot usurp that power. Now Lord *Coke* in his Comment on the Statute of *Westminster* 2., granting the writ of *nisi prius*, says, that a *nisi prius* shall not be granted where the King is party, or where the matter toucheth the right of the King, without his special warrant, or the assent of his Attorney-General. This is founded on the known rule, that no laches can be imputed to the King. And no other law has given the defendant this privilege. The same doctrine is corroborated by what was said by the court in *Rez v. Sir Jacob Banks*, that there could be no trial by proviso against the Crown: for which *Powell, J.* gave the reason, 2 *Ld. Ray.* 1083, I have before assigned; because a proviso implied laches, which could not be in the Crown. Then came the case of *The King v. Dyde*, which is an express authority in point. It is said, that that case passed without argument: but considering the character and talents of the defendant's counsel in that case, it cannot be supposed that he would not have argued the point if he had thought it tenable: and it is too much now to contend against the authority of the case, as not having been resisted, when the matter was thought even by the defendant's counsel to be too clear for argument. And even now that the question has undergone revision, not a single authority has been produced in support of the rule. Nor can I find any case where a defendant has taken down the record to trial by proviso as against the Crown. In saying so, I do not mean to be understood to include the case of prosecutions at the suit of private persons; those may admit of a different consideration: but I believe no such case ever existed where the Crown was the real prosecutor. It is unnecessary to enter into the particular merits of this case, or the complaint of oppression on the part of the defendant. What has been said by Mr. *Attorney-General* is perfectly satisfactory on that head. It is sufficient to observe, that we cannot grant the remedy prayed for. There is, however, a remedy(a) which the law and the books point out to the defendant, if he can shew a case of grievance to the Court to entitle himself to it. But whatever personal inconvenience he may have suffered by the delay, we have no authority to give him redress by this mode.

LAWRENCE, J. This is a dry question of law as to the practice in these cases: we cannot alter the law; we can only pronounce what we find it to be. For this purpose we cannot do better than look to the opinions of our predecessors, and particularly to what was said by Lord *Holt* in *Sir Jacob Banks's* case, which is very clearly reported in *Salk.* 652. "That in civil actions the defendant cannot carry down a cause by proviso till there be a laches in the plaintiff, except in causes where the defendant acts as a plaintiff, as in replevin, &c. That there can be no trial by proviso in a cause of the Crown, because there can be no default nor laches: nor can the crown be compelled to

sice may in part be referred to the statutes 5 W. & M. c. 11. and 8 & 9 W. 3. c. 33, which direct, that no indictment or presentment found at the quarter sessions shall be removed into this court by *certiorari* at the instance of a defendant, until he shall have entered into recognizance, &c. in a certain sum to appear and plead in B. R., and at his own costs and charges to cause and procure the issue joined therein to be tried at the next assizes after such *certiorari* returnable, &c. or at the sittings, &c. if the court of B. R. shall not appoint any other time for the trial thereof, &c. But these statutes will not solve the difficulty; for they relate only to indictments removed at the instance of defendants, where the record is made up by them (not by proviso, but pursuant to the recognizance,) without any laches having occurred in the prosecutor. And the statutes have no relation to informations or indictments removed by the prosecutor, where after one default by him the defendant makes up the record by proviso. At any rate, however, it seems that in all cases the attorney-general's warrant is necessary for the trial at *nisi prius*; (*Salk.* 652.) which, as it is said, implies the consent of the crown to try the cause in the country.

(a) This was probably in allusion to a trial at bar.

try any cause by *nisi prius*: and therefore, every cause of the Crown in this Court must be tried at bar, unless the Attorney-General allows a warrant of *nisi prius*, which implies his consent to try the cause in the county." So it is said all through the books, that there can be no trial by proviso against the Crown; because the only foundation for such a trial is laches in the other party, which cannot be imputed to the Crown. When this matter was first moved in Court, we referred the defendant's counsel to the case of *The King v. Dyde*, to shew that he could not have the relief he prayed in this form. In consequence of which another motion was substituted in lieu it, so strange and unprecedented, that the Court would not even grant him a rule to shew cause: then he reverted back to the present motion, upon a suggestion that the case of *The King v. Dyde* was decided without consideration. But it is an odd argument for lessening the authority of a case, that one of the most able advocates at the bar thought the point too clear for argument.

LE BLANC, J. This is an application for a trial by proviso. Now a trial by proviso is not a matter in the discretion of the Court to grant or refuse according to the particular circumstances of the case. Therefore, it is not an application to our discretion. But where a party is entitled to it, he has it of course without an application to the Court. The first motion which was made in this case for the fixing a particular day for the trial of this information could not be granted; because this Court cannot order what shall be done before the Judge of *nisi prius*. For it would be nugatory to make an order for the trial of the information on a particular day, when perhaps the prosecutor might not think proper to carry down the record. Then as to the present motion, there can be no trial by proviso in a case like the present, because there can be no laches imputed to the Crown. If no instance can be produced of a trial by proviso in a Crown prosecution, that of itself is a strong argument that none can be had. But it does not rest on that negative argument; for in the case of *Sir Jacob Banks* it was expressly said, that it could not be granted: and when the question was again brought forward in *Rez v. Dyde*, it was considered to be so clear and well settled by a counsel of great eminence at the bar, that it was given up without dispute. Then where no instance can be produced of such a trial, and it was holden in *The King v. Sir Jacob Banks* that it could not be granted, and the point was abandoned as untenable in *The King v. Dyde*, it would be too much for us to grant it against all the weight of authority.

Rule discharged,

Shepherd, Executor, &c. v. Johnson.

2 East, 211. Feb. 6, 1802.

In estimating the measure of damages in an action for breach of an engagement to replace stock on a given day, it is not enough to take the value of the stock on that day, if it have risen in the mean time; but the highest value as it stood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time while the market was rising.

THIS was a writ of inquiry to assess damages on a bond given by the defendant, conditioned that his co-obligor should replace a certain quantity of stock which the testator had lent him, and which was to be replaced on the 1st of August, 1799. At the trial before *Le Blanc, J.* at the sittings in term at Westminster, the only question was, Whether the damages should be calculated at 1133l. 18s. 6d. the price of the stock on the 1st of August when it was to be replaced; or at 1224l. 1s. the price of the stock on the day of the trial; the value of the stock having risen so much in the mean time? The learned Judge being of opinion, that as the agreement had been broken, and the stock never replaced, the plaintiff was entitled to recover the larger sum, being that

which could alone indemnify him at the present time. And the verdict was taken accordingly for 1224*l.* 1*s.*, with leave for the defendant to move the Court to reduce the damages to 1133*l.* 18*s.* 6*d.* if they were of opinion that the plaintiff was not entitled to recover more.

Littledale now moved for a rule to that effect; and referred to *Dutch v. Warren*, 2 Burr. 1010. 1 Str. 406, S. C., but not so well reported; and *Sanders v. Hawkley*, 8 Term Rep. 162, where the damages had been estimated by the price of the stock at the time when it ought to have been replaced; though he admitted, that in the latter case the stock had fallen in value before the trial. He also mentioned a case of *Isherwood v. Seddon*, sittings after Mich. term 1800, before Lord *Kenyon*; where in an action on a bond conditioned to replace stock on a certain day, the price of the day was taken as the criterion of the damages; because it was the plaintiff's own fault if he delayed bringing his action upon the default of the defendant, so as to lose the benefit of the subsequent rise of the stock. And he urged the last mentioned reason as an argument against taking the price of the stock at the day of the trial in case it had risen in the mean time; for then, after a default once made, it would be in the plaintiff's power, either by hastening or delaying his suit, to take advantage of the rise in the market, without any risk in case the market fell.

GROSS, J. The true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial. And it is no answer to say, that the defendant may be prejudiced by the plaintiff's delaying to bring his action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards so as to avail himself of a rising market.

LAWRENCE, J. Suppose a bill were filed in equity for a specific performance of an agreement to replace stock on a given day, which had not been done at the time; would not a Court of Equity compel the party to replace it at the then price of the stock, if the market had risen in the mean time?

LE BLANC, J. of the same opinion.

Rule refused(a)(1).

The King v. The Justices of Pembrokeshire,

2 East, 213. Feb. 9, 1802.

By a. 19. of stat. 13 Geo. 3. c. 78, where an order of justices has been made for stopping up a road an appeal is given to "the party grieved by any such order or proceeding, &c. at the next quarter sessions after such order made or proceeding had," &c. held that at all events an appeal to the sessions next after the actual obstruction of the road was too late; the party having had sufficient notice of the order in time to have appealed to a preceding sessions, before which time the surveyors of the highways had begun to stop up the road.

AT the general quarter sessions of the peace holden for the county of Pem-

(a) The same measure of damages was adopted in a case of *Payne v. Burks*, sittings after Mich. T. 1799, at Westm. C. B. cor. Ld. Eldon. [In *Gray v. The Portland Bank*, 3 Mass Rep. 364, the rule of damages was held to be the price of the stock at the time it should have been transferred or delivered with interest.]

(1) [The measure of damages has varied somewhat. In *M^r Arthur v. Seaforth*, 2 Taunt. 287, it was held that the plaintiff, in an action for not replacing stock, could select either the price at the day when it ought to have been replaced, or that at the day of trial; but not the highest price at any intermediate day. So, *Downes v. Back*, 1 Stark. C. 318. But in *Harrison v. Harrison*, 1 C. & P. 418, it was said that it was proper to take the price at the day of trial, or the day previous.—W.]

broke, on the 7th of *October* 1801, *Lady Owen* moved to lodge an appeal against an order of two justices, dated the 2d of *April* 1801, whereby they ordered that the highway in the parish of *St. Michael, Pembroke*, leading from the highway from the town of *Pembroke* to the village of *Hodgston*, to the new highway in the said order mentioned, should be stopped up: on an allegation that the road so ordered to be stopped up was the only way she had from her house to a certain farm belonging to her, and that she had had no notice of the said order till after the *July* sessions 1801. But it appearing to Court below, that the said order was made by the two justices on the 2d of the *April* 1801, and returned to the Sessions and recorded on the 16th of the same month, and that it was not appealed from till the then *Michaelmas* sessions, they refused to receive the appeal. Thereupon in *Michaelmas* term last a rule was obtained, calling on the defendants to shew cause why a writ of *mandamus* should not issue, commanding them at the next general quarter sessions of the peace holden for the said county to receive, proceed upon, hear, and determine the said appeal.

The affidavit of *Mr. Stokes* in support of the rule stated, that on the 17th of *July* last, he as solicitor for the estates of *Lady Owen* was informed, that certain orders had been made for diverting one road, and also for stopping the road in question, which tended much to her injury. That on the 20th of *July*, he examined the respective roads mentioned in the orders: that he passed and repassed on horseback over the whole of the road in question directed to be stopped up; and that the same was not in any way stopped up, obstructed, or impeded on that day; nor did it appear that any stopping up or obstruction had been made upon the same. That the quarter sessions were holden on the 16th of *July*, and that the deponent was informed and believed that *Lady Owen* had not by herself or agents any notice or information of such orders until the 17th of that month. That in *August* he was informed, that on the 31st of *July* last, the surveyors of the highways for the parish of *St. Michael Pembroke*, had caused a bank to be raised and a ditch to be sunk across the road in question; and thereupon the deponent prepared, and served a notice of appeal for the *Michaelmas* sessions against the order for stopping up the same: which appeal was afterwards rejected by the said Court. One of the orders referred to by the affidavits was an order by two magistrates, dated 2d of *April* 1801, for diverting a certain highway between *Lamaston* and *Pembroke*, and turning it in another direction more commodious for the public; followed by a certificate of the same magistrates, that the new road was fit for use, and directing the old way to be stopped up. Another order was of the same date made by the same, for stopping up a cross road (the road in question) leading from the old to the new highway. Another affidavit was made by one *Morse*, stating his being employed by one of the surveyors of the highways to stop up the road in question, which he did on the 31st of *July* aforesaid, by sinking a ditch and erecting a bank across it: and that previous thereto the road was open and free for travelling: and that till then there was no stopping up or obstruction of the same, to the best of his knowledge and belief.

In answer to the rule, it was sworn by the magistrates making the orders, that by a mistake the order made by them for the use of the surveyors of the highways was filed at the quarter sessions on the 16th of *April* 1801, instead of the order intended to be so filed (though in substance the same:) but that the mistake was rectified a few days after those sessions, and the proper order substituted in lieu of the other. That the orders referred to were for more than ten days previous to the said last *Easter* sessions publicly known in the parish of *St. Michael, Pembroke*, and directions given by them (the magistrates) to the surveyors of the highways in the said parish, to carry the same into immediate execution, preparatory steps having been before taken for that purpose. That they did not believe (for reasons stated by them), that *Lady*

Owen sustained any injury or impediment from stopping up the road in question. That one *J. M.* for several years past had been the reputed managing agent or bailiff of *Lady Owen*, and resident on the spot, and that *Mr. Stokes* resided at the distance of twelve miles off: that *Mr. Stokes* was present at the Easter quarter sessions, when the order in question was so filed as aforesaid, and that the rolls or records of the said court were kept in his office. One of the surveyors of the highways also swore to the publicity of the said orders in the parish, and that he received them ten days previous to the Easter Sessions on the 15th of *April*. And several labourers, who were employed upon the roads by the surveyors, deposed, that on and before the 2d of *April* 1801, they were so employed to turn the old and make the new highway mentioned in one of the orders, and also to stop up the old highway and crossway in question. That while they were turning the old highway ten days before the 15th of *April*, *J. M.* the domestic servant and managing agent of *Lady Owen*, in company with a certain tenant of hers, came up to them and inquired what they were doing, to which they answered, that they were employed by the surveyors of the highways of the parish to turn the old and make the new road (before mentioned), and were also directed to stop up the highway in question. On which *J. M.* then informed him, that if they stopped up the said highway, he had orders from *Lady Owen* to send men to pull down the obstruction as soon as it was made. That some short time before *July* last, the surveyors again ordered them (the labourers) to stop up the road in question, which they accordingly did by making a fence or frith across the same several days before the 15th of *July*, when the Sessions were holden; which frith or fence continued to remain across and obstruct the said way for several days, but was afterwards torn down by persons unknown; and afterwards again made up by *Morse* before mentioned: that the fact of such employment of labourers for that purpose by the surveyors was publicly well known in the parish of *St. Michael*, as they worked there for six days.

The stat. 13 Geo. 3. c. 78. s. 19, enacts, "that where (in the cases therein mentioned), any highway, &c. shall be so ordered to be stopped up or inclosed, it shall and may be lawful for any person injured or aggrieved by any such order or proceeding, or by the inclosure of any road or highway, by virtue of any inquisition upon a writ of *ad quod damnum*, to make his complaint thereof by appeal to the justices of the peace, at the next Quarter sessions, &c. after such order made or proceeding had, as aforesaid, upon giving ten days notice in writing of such appeal to the surveyor and party interested in such inclosure, if there shall be sufficient time for such purpose: if not, such appeal may be made upon the like notice to the next subsequent Quarter sessions, &c. which courts of Quarter sessions are authorized to hear and finally determine such appeal. And if no such appeal be made, or being made, such order and proceedings shall be confirmed by the said court, the said inclosures may be made, and the ways stopped, and the proceedings thereupon shall be binding and conclusive to all persons whomsoever," &c.

Erskine and *Wigley* shewed cause against the rule; and relied on the words of the act as conclusive, that the appeal must be lodged at the next Quarter sessions after the order made, provided there be time to give notice, otherwise at the ensuing Quarter sessions; and therefore no subsequent Quarter sessions can take cognizance of it. Then waiving the question whether the appeal might not have been preferred at the Easter sessions, at any rate it could not be deferred beyond the *July* sessions; the order having been formally recorded immediately after the Easter sessions, though in substance made and lodged before; and there having been as much publicity in it as the subject matter would admit of, so that the party aggrieved could not complain of being surprised. That several days before the 15th of *July*, when the

Sessions were holden, the road had been actually obstructed, though the obstruction was afterwards wrongfully removed by persons unknown.

Gibbs, Dauncey and Lord, contra. The appeal is given to the party injured or aggrieved; but until the old road be actually obstructed the mere order works no grievance or injury to any one: therefore the true construction of the act must be to give the appeal to the next Quarter sessions after the grievance or injury sustained. For otherwise an order may be obtained behind the back of the party interested, of which he may have no notice till after the next Sessions in fact have passed, when according to the construction contended for, he would be concluded, without any opportunity of having his complaint heard: but it cannot be intended that the legislature meant any thing so illusory and unjust. The words of the act are, "after such order made or proceeding had." The word *proceeding*, then, must mean *proceeding under the order*; for it has no reference to any other antecedent matter. Now the road was not effectually obstructed till the 31st of *July*; and the appeal was made to the *Michaelmas* sessions, which were the next in point of time: at most, there was only an ineffectual obstruction a few days before the *July* sessions, which in no event would be sufficient to conclude the party aggrieved, as it does not appear to have been *ten* days previous, so as to enable her to give the notice required by the act; in which case the appeal must be made at the next following sessions. In *Rez v. The Justices of Staffordshire*, 7 Term Rep. 81, the Court seemed to think that the question as to the time of appeal turned upon the time of receiving notice of the order. But it was not necessary to decide the point in that case, as at any rate the party applying for the *mandamus* to the Sessions to receive his appeal was not entitled to it, for want of ten days previous notice of appeal. In other cases, the construction of similar words in acts of Parliament has been holden to be the next possible Sessions after notice, as in case of orders of removal. *Rez v. The Justices of the East Riding of Yorkshire*, Dougl. 192. And there, too, the time of appeal is reckoned from the execution, and not from the making of the order; though the words of the act 13 & 14 Car. 2 c. 12, are general(a). So the time for appealing against a poor rate is reckoned from the publication(b), and not from the making of the rate.

GROSE, J. This is an application for a *mandamus* to the Quarter sessions to receive and hear an appeal against an order of Justices for stopping up a certain road; and the question is, Whether the time for appealing were expired when the application was made to the court below? whether, according to the true construction of the statute giving the appeal, the appeal be given to the next sessions after the order made, as contended on the one hand; or to the next sessions after the party is aggrieved, as contended on the other hand; it is unnecessary for us to determine: though I must observe, that the words of the act are very strong, that the appeal shall be made to the next sessions "after such order made," &c. There are, however, other words upon which stress has been laid. But at any rate, I am satisfied that in this instance the appeal was not made to the next sessions after the party was aggrieved. The order of Justices was made on the 2d of *April*; and so notorious was it, that ten days before the *Easter* sessions the labourers employed upon the road had a conversation with the managing servant of Lady *Owen* about the stopping up of this very road; and he threatened what she would do if it were stopped up. No affidavit has been made by Lady *Owen* herself, to deny that she had notice; and therefore we must presume that she had notice of all that was doing at that time. Then again, some short time before *July*

(a) Sect. 2. "All such persons who think themselves aggrieved by any such judgment of the said two justices may appeal, &c. at the next Quarter sessions," &c.

(b) *Rez v. Micklefield*, Cald. 512. and vide *R. v. Atkins*, 4 Term Rep. 14, and *R. v. Stanley*, Cald. 172.

the same persons had further orders from the surveyors of the highways to stop up the road in question : which was accordingly done several days before the *July* sessions, by making a fence across it. No appeal, however, was made till the *Michaelmas* sessions following ; which cannot be considered as appeal to the sessions next after the party was aggrieved. Her own family considered her as aggrieved by the order long before. Under these circumstances it would be too much to let the *mandamus* go, even if there were any doubt whether she herself had had notice till after the *July* sessions. But if it were necessary to give an opinion on that point, it would be that she had notice of all that had been done before : and then, according to every fair construction of the statute, the time for appealing was passed.

LAWRENCE, J. I think the *mandamus* ought not to go. Two different constructions of the statute have been contended for ; the one that the appeal must be to the Quarter sessions *next after the order made, &c.* : the other, that it is given to the next Sessions *after the party is aggrieved* : and it has been argued that the party is not aggrieved by the making of the order, but by the execution of it. Now it cannot be said, that the act gives the appeal to the next sessions after party is aggrieved ; for by the express words of it, " it shall be lawful for the party aggrieved by any such order or proceeding, or by the inclosure of any highway, by virtue of any inquisition " on any writ of *ad quod damnum*, to appeal to the next Quarter sessions *after " such order made or proceeding had as aforesaid," &c.* It is clear that this appeal was not made to the sessions *next after the order*. Then the only question is, Whether it were made to the sessions *next after the proceeding* ; and what is meant by the term *proceeding* there used ? It does not mean acts done under the order ; but it is used as descriptive of some legal procedure similar to order ; " such order made or proceeding had as aforesaid " refers to the *proceeding before the magistrates*, stated in the previous part of the act. Then it is said, that the party ought to have notice, otherwise the power of appeal given will be nugatory. But here there does appear to have been notice ; for the labourers employed by the surveyors expressly told Lady Owen's manager what they were going to do. Whether Lady Owen, by virtue of such an order, will be precluded from the use of the road is another question, upon which it is unnecessary to say any thing at present. But upon the construction of the act as to the time of appealing, I see no other line to go by : for otherwise it is difficult to say to what period an appeal might be deferred ; it might be long after the order was executed ; for the party might not have notice for months or years afterwards.

LE BLANC, J. Upon either of the constructions of the statute contended for, the appellant came too late. For she neither appealed to the sessions next after the order made, nor to that next after notice had of it. For taking the notice to Lady Owen's managing servant to be notice to her, it was an express notice of the order for stopping up the road in question. By the words of the statute, " the appeal is given to the Sessions next after such order made or proceeding had." There could be no doubt as to the first part : but it is said that the word *proceeding* means the stopping up of the road : but by attending to the place where that word is used, it will appear that it cannot have that meaning ; for in the former clause it is used as synonymous to order ; and in the very same clause it is used in the same sense with order, and as distinct from the act of stopping up the road : the words being " that it shall be lawful for any person aggrieved by any such order or proceeding, or by the inclosure of any road," &c. No inference can be drawn from the construction put on other acts of Parliament, giving the appeal in different words from the present.

Rule discharged.

The King v. The Inhabitants of Moor Critchell.

2 East, 222. Feb. 10, 1802.

If an order of removal be confirmed at the sessions, and both orders be afterwards removed into B. R. by *certiorari* on a case reserved, and this court disapprove of the orders, for want of jurisdiction of the removing magistrates appearing on the face of the original order; this court will quash both the orders, without remitting the matter back to the sessions to quash the original order, for the purpose of enabling them to give maintenance according to stat. 9 Geo. 1. c. 7. s. 9, and at any rate, they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced.

IN consequence of the opinion of the Court, expressed in this case in the last term, (a) the following special order was made:

"Upon hearing counsel on both sides, it is ordered, that an original order of two Justices for the removal of *D. Spearing, &c.* from the parish of *Donhead St. Mary*, in the county of *Wilts*, to the parish of *Moor Critchell*, in the county of *Dorset*, and also an order of sessions made in confirmation thereof, be severally quashed for the insufficiency thereof: it not appearing on the face of the said original order, that the said Justices, at the time of making the same, were Justices of the Peace for the said county of *Wilts*."

Gibbs now moved (b) "that the above rule might be altered, by omitting such part thereof as relates to quashing the original order of the two Justices, and that the same may only order that the order of sessions made in confirmation of the original order of the two Justices be quashed; and that the Justices below may be ordered to enter a continuance to the next Sessions." The object of this rule was, he said, to enable the appellant parish to apply to the sessions for the expence of maintenance, which by the stat. 9 Geo. 1. c. 7. s. 9, could only be allowed by the sessions on appeal, and an adjudication by them that the pauper was unduly removed; which judgment would now be obtained as their former erroneous opinion had been corrected by the decision of this Court. And he referred to *Rez v. Yarpole*, 4 Term Rep. 71, where an order of removal having been confirmed by the sessions on appeal; and this Court having afterwards determined (on a question reserved for their opinion) that so many of the justices below as concurred in that judgment were disabled to vote on the particular question by reason of having an interest in one of the parishes concerned, so as to reduce the number to a minority in respect to those who voted for quashing the order; yet this Court would not quash the original order, but referred the case back to the sessions; directing them to enter a continuance to the next sessions in order that they might make the order for quashing, &c. which ought to have been made at first.

Burrough and *Casberd* shewed cause in the first instance; and said, that the direction given in the case cited was not warranted by the general practice of the Crown-office, and had not been followed up by the directions of the Court in subsequent cases. That it was contrary to what was done in *Road v. North Bradley*, 2 Stra. 1168, where this Court exercised a jurisdiction not only over the judgment of the sessions, but also by quashing an antecedent order of justices, being properly quashable on appeal. They also referred to various subsequent cases (c) where the form of the judgment was at variance with *Rez v. Yarpole*. And contended further, that the common practice was right on principle; for when all the orders were brought before the Court by *certiorari*, its jurisdiction attached upon them so as to deal with

(a) Ante, 66.

(b) Notice of the intended motion was previously given to the attorney for the parish of *Donhead*.

(c) *Rez v. Birdbrooke*, 4 Term Rep. 245. *Rez v. Hinckley*, ib. 371. *Rez v. Darlington*, ib. 797. *Rez v. Bilton, &c.* 1 East 13 and ib. 239. 247. 373. 597. and 2 East 25 & 63.

them as justice required. That at any rate, this case was distinguishable from *R. v. Yarpole*; for here the objection made went to the merits of the original order itself, to which the attention of the Court was called, as well as to the order of sessions; whereas there the objection went only to the order of sessions. But however incorrect the judgment of this Court had been, it was now too late to revise it upon motion; being a judgment of a term passed, and not now impeached on the ground of any clerical mistake, but for error in judgment.

GROSE, J. Both orders were regularly before the Court in the last term. We then did what we thought right with them, and pronounced our judgment; and it is too much to apply now to rescind it.

Per Cur.

Rule refused.

Harrison v. Franco.

2 East, 225. Feb. 11, 1802.

All double pleas must be filed, and not merely delivered to the plaintiff's attorney; though two pleas be pleaded, which separately need only have been delivered.

UPON a rule to shew cause why the proceedings should not be set aside for irregularity, the question was, whether the pleas should have been filed, or whether it were insufficient to have delivered them, as had been done. The pleas were the general issue, and *plene administravit*; neither of which separately need be filed^(a), as was admitted; but being pleaded together, it was contended they ought to be filed like all other double pleas, which must be pleaded by leave of the Court. And of this opinion was *The Court*, after consulting the Master; and made

The Rule absolute.

Laves in support of the rule.

Marryat, contra.

The King v. Dr. Wynn.

2 East, 226. Feb. 11, 1802.

The Court will not quash a defective indictment on the motion of the prosecutor after plea pleaded, before another good indictment be found.

AN indictment was found at the Sessions against the defendant for an aggravated misdemeanor, to which he had pleaded. And now the record having been removed hither by *certiorari*, a rule was obtained on the part of the prosecutor for quashing the indictment for error apparent on the face of it; another more perfect indictment being, as was said, prepared and intended to be preferred.

Jekyll, on behalf of the defendant, shewed cause against the rule; contending, that after plea pleaded the Court would not quash an indictment; according to *Rex v. Frith*, 1 Leach. 12: at least, not unless another indictment were found, which might be substituted in lieu of the other; *R. v. Webb*^(b): and this too passed by consent; which he said he was not authorised to give in this case, unless upon certain terms: (which were not acceded to by the prosecutor).

Dampier, for the prosecution, said, it would be nugatory to proceed to trial on an indictment palpably defective, and when another was prepared and was intended to be preferred as soon as possible. That there was no occasion for

(a) Vide 1 Tidd, 599.

(b) 3 Burr. 1468, and vide 2 Hawk. c. 25. s. 146, &c. and 3 Bac. Abr. 573, where all the cases are collected; and *Rex v. Stratton*, Dougl. 289.

the defendant's consent, if the Court saw sufficient reason for quashing it on the motion of the prosecutor: and no injury could ensue to the defendant, as the prosecutor could not be forced on to trial before the Summer assizes.

The Court having consulted with the officers of the Crown-office,

GROSE, J. said, that he was not aware that the consent of the defendant was necessary for quashing an indictment even after plea pleaded: but that the Court had laid down a rule to govern their discretion in such cases in general, in order to avoid collusion: and therefore they thought it more advisable to let this rule be enlarged, so as to give time to the prosecutor, if so advised, to prefer another indictment before they disposed of the present rule.

Rule discharged.

Hammonds and Another, Executors of Blight, v. Barclay and Others, Assignees of Fentham a Bankrupt.

2 East, 227. Feb. 12, 1802.

A principal gives notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence draws bills on him, which the factor accepts; and then the principal dies; and his executors direct the captain of the ship to follow his former orders; who thereupon delivers the ship into the possession of the factor, who sells the same: held that the factor has a lien upon the proceeds as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due.

THIS was an action of *assumpsit* for money had and received by the defendants for the use of the plaintiffs; to which the general issue was pleaded. At the trial at *Guildhall* before Lord *Kenyon*, C. J. a verdict was found for the plaintiffs, with 255*l.* 1*9s.* 6*d.* damages, subject to the opinion of this Court on the following case:

In April 1799, the testator *J. Blight*, who was then resident in *Jamaica*, and the owner of the ship *Julius Cæsar*, having on board a general cargo on freight for *London*, addressed the said ship to *Fentham* his correspondent in *London*; and wrote him a letter dated the 17th of that month to this effect: "I am now loading the ship *Julius Cæsar* for *London* addressed to you, and I requested you to effect insurance on freight of the ship 4000*l.* sterling; say 4000*l.* sterling on ship *Julius Cæsar*, *James Adams* master, from *Black River*; warranted to sail with convoy. I have also to request you to effect a further insurance on 50 tons of logwood." This letter was received on the 30th of *July* following. On the 9th of *May* in the same year, *Blight* wrote a second letter to *Fentham*, which arrived in *August* following; in which he says: "I hope my letters arrived int ime for you to effect the insurance on the freight of the ship *Julius Cæsar*, as I mean to draw on you for 2000*l.* sterling in part. You have my instructions to sell this vessel as soon after her arrival as possible. I think she will on inspection command 6500*l.* sterling, ships being much in demand: but at all events sell her." On the 1st of *May* the ship sailed from her port of loading for her place of rendezvous at *Jamaica* to join convoy. And on the 2d of *June*, *Blight* died; intelligence of which event having reached Captain *Adams* before the ship's departure from the place of rendezvous, he applied to the plaintiffs as executors, both of whom then resided in *Jamaica*, for instructions how to proceed; who thereupon directed Captain *Adams* to follow the instruction he had before received from the testator. In consequence of the above two letters from *Blight*, *Fentham* effected an insurance on the freight of the *Julius Cæsar*, the premiums of which amounted to 982*l.* 10*s.*: but a return of premium was afterwards made to the amount of 570*l.* And he also accepted three bills of exchange drawn upon him by *Blight*, two of which bills he duly paid before his bankruptcy to the amount of 650*l.*; and the remaining bill for 1000*l.* is now outstanding against him.

The said insurance was effected, and the acceptances were given, by *Fentham* before the ship's arrival in *England*, and before he had received any intimation of the death of *Blight*. On the 30th of *September*, the *Julius Caesar* arrived at *London*, and the captain in consequence of the instructions he had previously received, immediately put her under the charge of *Fentham*, and delivered over the ship's register to him: after which the latter disbursed a further sum for seamen's wages and the necessary use of the ship to the amount of 490*l.* 3*s.* 6*d.* On the 14th and 21st of *July* in that year, the plaintiffs wrote to *Fentham* from *Jamaica*, which letters were respectively received by him on the 3d and 16th of *September* following; in the first of which, after communicating the death of *Blight* and their appointment as his executors, they say, "The *Julius Caesar* after incurring a very extraordinary expence "in her outfit, &c. sailed with the last fleet:" and in the second letter they say, "We observe you have effected insurance to the amount of 4000*l.* sterling on freight, and 2000*l.* on logwood, *per* ship *Julius Caesar*. As the "wood has not been shipped, you will of course have the policy cancelled, "and the necessary returns for short interest made. Captain *Adams's* account "is likewise unsettled; but as Mr. *Hammonds*, who has copies of his several "accounts, will be in *London* about the time you receive this, you will be able to settle with him." Soon after the arrival of the ship, *Fentham* gave directions to Messrs. *Hopkins* and *Gray*, ship-brokers in *London*, to sell the ship and collect the freight. Shortly after which *Fentham* became bankrupt, and a commission issued against him, under which the defendants were chosen assignees. Since which time Messrs. *Hopkins* and *Gray* have sold the ship and collected the freight due, upon the said voyage, and have accounted with the defendants and paid over to them the sum of 2556*l.* 19*s.* 6*d.*, part of the net proceeds thereof. The question for the consideration of the Court was, whether the defendants as assignees of *Fentham* have any, and what lien upon the ship, or freight, or the proceeds thereof; so as to be entitled to set off in this action the whole or any part of the disbursements or acceptances.

Dickens, for the plaintiffs, admitted that the defendants were entitled to set off 490*l.* 3*s.* 6*d.* disbursed by the bankrupt for the seamen's wages, and the necessary use of the ship after her arrival at *London*. But as to the remaining sums; he contended that the defendants had no lien on the proceeds of the ship: 1st, because no property in the ship was vested in *Fentham* by the testator, but only an authority which was countermanded by his death. 2dly, Because in no case where an action is brought by executors in their own name, can a defendant set off a debt due to him from the testator. [This last argument, however, was afterwards abandoned; the Court thinking the question of set-off strictly did not arise in this case; but only whether in this form of action founded in equity and conscience the plaintiffs were entitled to recover: and which was in truth the question agreed to be tried between the parties.] As to the principal question; though if a factor have advanced money for his principal on the faith of an intended deposit, he may set off his demand or have a lien for it, if the deposit be made; yet he can have neither, unless the goods come into his hands by the delivery or on account of the principal. And in no case can there be a lien where the property has changed hands in the mean time before it came into the possession of such factor. Suppose, after the factor had advanced money on the faith of such intended consignment, the owner had sold the ship to a *bona fide* purchaser, (e. g. the present plaintiffs) by whom it was afterwards put into the possession of the same factor, he could have no lien in respect of his former advance to the original owner. His only remedy in such case would be by action, as was said by Lord C. B. *Eyre* in delivering the opinion of the Judges upon the case of *Kinloch v. Craig*, 3 Term Rep. 783—7, in the House of Lords. In that case, as in the present, the factors had accepted bills drawn upon them

by their principals, on the faith of intended consignments to be made to them; but before those consignments arrived they had stopped payment, and afterwards became bankrupts: and it was determined, that as there was no actual delivery of the goods to them before, there could be no lien. A lien can only attach while the property remains in the original debtor. Here *Blight* did not act in his lifetime to vest the property in *Fentham*: on *Blight's* death, therefore, it vested by operation of law in the plaintiffs his executors; and this before it got into the possession of *Fentham*, who had nothing but a bare authority. If notwithstanding *Blight's* death *Fentham* had put up the ship to sale, or the captain had delivered it to him without the authority of the plaintiffs, it would in either case have been a wrongful act. On the contrary, the captain having received the instructions of the plaintiffs, and *Fentham* having accepted the ship in consequence, he thereby became the agent of those who were the legal owners, and accountable to them. [He also suggested another fact, which was not stated in the case, but was not now disputed, namely, that after the ship got into *Fentham's* hands the plaintiffs countermanded the sale.] At any rate, there is no colour for any lien for the amount of the acceptance outstanding; which is never considered as payment, and probably in the event may never be paid. In *Kinloch v. Craig*,^(a) Mr. Justice *Ashurst* in delivering the opinion of the Court observed, that there was a great difference in this respect between *payment* and a *liability* to pay. In *Lickbarrow v. Mason*, 2 Term Rep. 63, acceptances were given by the consignee; and yet it was holden that the consignor might stop the goods *in transitu* on the insolvency of the former.

Warren, contra, said, that the whole of the plaintiffs' argument turned upon a fallacy, in assuming that they claimed in a different right from the testator; whereas they took it subject to every charge equitable and legal with which the testator himself held it. Therefore, if he had given any charge irrevocable upon it, they took it accordingly; if revocable, they might have revoked it; but not having done so, the same lien attached upon it when it got into *Fentham's* possession as would have been the case had *Blight* lived. He might have revoked the consignment as well as his executors, and then *Fentham* could only have had his remedy by action against him: the executors could have done the same, subject to the like consequence; but they did not revoke it, but confirmed the act and authority of their testator as they were bound in conscience to do. Therefore, the ship came into *Fentham's* hands with all the consequences of the original consignment, and not as from a new purchaser. *Fentham* had something more than a bare authority from *Blight*; he had an authority coupled with a contract. He accepted the bills upon an engagement that he should have the ship to sell, out of which he was to be repaid. A bare authority is such as may be revoked without any consequence: but *Blight* could not have revoked the consignment without subjecting himself to an action for a breach of contract; he was under an obligation to fulfil his contract, and that obligation attached upon his executors. In *Kinloch v. Craig* the agreement was stated to be executory till the delivery of the goods to the factor; that shews that after the delivery it becomes executed, and can no longer be rescinded. Then if a testator enter into an agreement which is executory, and after his death his executors do not rescind it, but suffer it to be executed, it becomes so with all the consequences which would have resulted from its execution in the lifetime of the testator. This is very different from the case supposed, that the plaintiffs stand in the same situation as if they were common purchasers of the vessel; for the titles of vendor and vendee are opposite and adverse; but that of an executor is continuing and affirmative of the title of his testator. If a vendee of the ship had rescinded such a contract made by the vendor to the factor, no action would

(a) 3 Term Rep. 122. This was the first time that case came before the Court.

have lain against him; but it is otherwise in the case of an executor. But though the relation between *Fentham* and *Blight* were at an end, yet the former would retain his lien as agent of the executors, who authorized the captain to execute the orders he had before received from the testator: which implies an authority to *Fentham* to sell and retain for his original lien. Then as to the acceptance for 1000*l.* still unpaid, for which the lien is particularly objected to; what was said by *Ashhurst, J.* was beside the principal point in judgment; and besides, it was said with reference to the primary question of stopping *in transitu*; as not precluding that right in the consignor: but it does not follow from thence, that when the *transitus* is ended and the consignee has got possession of the goods, the lien does not attach: and indeed it was expressly so considered in the same case. And that opinion is founded in justice. The factor is induced to give his acceptance, and make himself liable for the debt of the principal, upon the faith of the consignment, by which the condition of the factor is materially altered; and it is contrary to justice and equity to withdraw the consignment without putting the factor in the same situation as before. It is sufficient in all cases to establish a lien that the goods should have come into the possession of the consignee, and that he should have made himself liable to answer by his acceptance for the benefit of the consignor. *Drinkwater v. Goodwin*, Cowp. 251.

Dickens, in reply, said, that nothing could be collected from the facts of the case to shew that the plaintiffs intended so to ratify the testator's acts as that the bankrupt should have a lien for his original demand; for they did not even know what had been done till some time after the orders to the captain were given: and they cannot be taken to have ratified the original contract by implication; as they might thereby be guilty of a *devastavit* in preferring a simple contract debt to one of a higher nature: which would not be presumed against them. That in *Kinloch v. Craig* a constructive possession, as by paying part of the freight, was deemed not sufficient to give a lien: but that at all events no possession could so operate unless it came to the party by authority of the principal. That in *Drinkwater v. Goodwin*, the bond, in which the factor had joined, as a security for his principal, and for which he claimed to have a lien was paid by him before the action brought: but here the acceptance for the bill of 1000*l.* is still unsatisfied.

Curia advisare vult.

GROSE, J. now delivered the opinion of the Court. In this case the plaintiffs claim, not in form but in substance, as executors of *James Blight*, a sum of money 2556*l.* 19*s.* 6*d.*, the produce from the sale of the ship *Julius Caesar* received by the defendants as assignees of *Fentham*, a bankrupt: and the question is, Whether, as such assignees, they have any, and what lien upon the ship, or freight, or proceeds thereof; so as to be able to set off what has been paid by *Fentham* in the disbursements and acceptances stated in the case? A lien is a right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied. That the defendants have a right to retain 490*l.*, part of the sum insisted upon as due to the defendant, is admitted. That they have no right to retain 312*l.* 10*s.*, the balance of premiums paid upon the insurance account, nor the 650*l.* upon the bankrupt's acceptances, nor that which the defendants are liable to pay on the acceptance of the bill for 1000*l.*, is insisted: because whatever authority the testator gave was countermanded by his death. The evident consideration upon which the premiums for insurance and the amount of the two bills were paid, and the third accepted, was the consignment of the ship and cargo: and it does not seem very consistent with justice to say, that after the consignee had advanced the premiums, and paid bills on the credit of the consignment, the death of the consignor should operate as a revocation, so as to prevent the bankrupt and his assignees having the fruits of that which was the foundation and consideration upon which he disbursed his mo-

ney. But as between the plaintiffs, his executors, and the bankrupt, (and his assignees stand in his shoes,) there is another clear decisive answer; which is, that they affirmed the orders of their testator, and directed the captain to follow the instructions before received from him, which were to effect insurance on freight of the ship 4000*l.* sterling, as he meant to draw on him for 2000*l.* in part; to sell the vessel as soon after her arrival as possible; at all events to sell her. Then the plaintiffs write to the bankrupt affirming his acts; ordering him to get a return of premium on account of logwood not shipped; and to settle Captain *Adam's* account. By their authority then he was in possession of the ship, and is entitled to retain out of the proceeds whatever he has expended by the testator's or their order; they standing in the shoes of the testator, and representing him as the defendants represent the bankrupt. Upon these grounds we are of opinion that there is no foundation for the above objection; but that the bankrupt having been in possession of the ship, and having sold it, and received the proceeds both by the authority of the testator and the plaintiffs his executors; and that the money being paid and the bills accepted upon the credit of the ship and cargo consigned to him; his assignees, the defendants, have a lien upon such proceeds for the several sums of 312*l.* 10*s.* for premiums advanced; 650*l.* money paid on two bills accepted; and 490*l.* sailors' wages; and for such sum as they shall be compelled to pay upon the third acceptance for 1000*l.*; and that the case of *Kinloch v. Craig*, the authority of which was relied on to prove that the bankrupt had no lien for the acceptance which he has not paid, does not rule this case. For there *Sandiman* and Co. had never possession of the property on which they claimed a lien, as *Fentham* had in this case: and that case only determined that a person making himself liable by his acceptances did not thereby prevent the consignor's right of stopping *in transitu*, in case of his insolvency; and it did not decide, that when a man had in his possession the effects, on the credit of which he had made acceptances, that he might not retain those effects, until he was indemnified against the liability to which he had subjected himself.

Postea to the Defendants(a).

Doe on the Demise of Williams, v. Humphreys.

2 East, 237. Feb. 12, 1802.

A landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired, the landlord, fearing that the witness by whom he was to prove the notice would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment; held the second notice was no waiver of the first.

THIS was an ejectment, tried at the last Summer assizes for *Shrewsbury* before *Lawrence, J.* to recover possession of a farm in the parish of *Nannerch* in the county of *Flint*, which the defendant held as tenant from year to year to the lessor of the plaintiff. The farm consisted of lands of different descriptions to be quitted at different times; the arable on the 29th of *September* 1800; the pasture and meadow on the 30th of *November*; the dwelling-house, &c. on the 1st of *May* 1801. The lessor, in order to determine the defendant's interest in the premises in question, served him on the 21st of *March* 1800 with a notice to quit the farm at the several times above stated; and the defendant not having quitted the arable on the 29th of *September*, nor

(a) Vide *Copland v. Stein*, 8 Term Rep. 199. where the principal was a bankrupt at the time of the consignment, the factor who had accepted, and paid bills drawn on him by the principal on the faith of such consignment, was holden accountable to the assignees of the principal for the value of it.

the meadow and pasture on the 30th of *November*, the lessor brought his ejectment in the Court of Great Sessions for the county of *Flint* against the defendant; pending which ejectment, he delivered to the defendant another notice(a), dated the 20th of *March* 1801, to quit the messuage and dwelling-house called, &c. *which he then held under him*, together with the lands, &c. thereunto belonging, to wit, the arable on the 29th of *September* 1801, the meadow and pasture on the 30th of *November*; the dwelling-house, &c. on the 1st of *May* 1802. It was objected at the trial, that the second notice was a waiver of the first, being a recognition of the tenancy still subsisting. But the objection was over-ruled, and a verdict taken for the lessor of the plaintiff, with leave to the defendant to move to enter a nonsuit; or if the lessor were only entitled to recover part, to enter a verdict for such part. A rule *nisi* for that purpose was accordingly obtained in *Michaelmas* term last; against which, in the same term,

Gibbs, Manley, and Wynn, shewed cause, contending that the second notice was no waiver of the first: for it was given after the ejectment commenced, and pending the prosecution of it, which was not abandoned; which rebutted the presumption of any intention in the lessor to waive the first notice. The only reason for giving it was in case the lessor should not be able from circumstances to avail himself of the first notice. That every contract for letting must be mutual: but if the defendant had an option to consider the second notice as a waiver, or not, without the concurrence of the lessor, there would be no mutuality. That at the time it was given the defendant had become a trespasser, at least as to part of the lands; and therefore it could not reinstate him as tenant, without a new agreement between the parties. And they relied on *Messenger v. Armstrong*, 1 Term Rep. 53, where after a notice at the expiration of the lease, a second notice, delivered to the tenant after the expiration of the first notice, to quit on a *subsequent* day, or to *pay double rent*, was holden to be no waiver of the first.

Leycester and Glead, contra, insisted that the second notice was waived by the first, inasmuch as it was absurd and nugatory to give such second notice if the landlord meant to abide by the first; and also because he therein expressly recognized the defendant to be his tenant; for he gave him notice on the 20th of *March* 1801 to quit the premises *which he THEN held under him*. That there was mutuality in this case; for the tenant assented to the first notice should be waived by continuing to hold on. That if the landlord did not mean it as a waiver, he should have said so, as was said in effect in *Messenger v. Armstrong*, by claiming double rent of the tenant if he did not quit; and there too the double rent was already incurred. That at any rate, it was a question for the jury to say whether it were intended as a waiver or not, according to *Doe d. Cheney v. Batten*, Cowp. 243:

Curia advisare vult.

GROSE, J. now delivered the opinion of the Court. (After stating the facts as before set forth.) The defendant insists that the second notice is a waiver of the first; and that he was not bound to quit at the times mentioned in it. In the course of the argument it was admitted, that if the plaintiff had not intended that the second notice should operate as a waiver of the first, he might have so explained his intention, by adding that the purpose of the second notice was to enable him to recover the premises at a subsequent assizes, if by any accident he should fail at those then ensuing. And under the circumstances of this case, we are of opinion that the defendant must have so understood this notice; for it was necessary to give a notice previous to the then next assizes, to enable the plaintiff to determine the defendant's interest

(a) The second notice was copied *verbatim* from the first, with the alteration only of the dates; and the reason suggested at the bar why it was given was, because the person who was to prove the service of the first notice was dangerously ill, and it was apprehended that the lessor would not be able to prove the notice.

on the 29th of *September* following, if he had not succeeded at the next assizes; which circumstance furnished an obvious reason for giving the second notice differing from an intent to waive the first: and it was not possible for the defendant to suppose the plaintiff intended to waive the first notice, when he knew the plaintiff was, on the foundation of that very notice, proceeding by ejectment to turn him out of the farm. Lord *Kenyon*(a) agrees with us in opinion that the plaintiff is entitled to recover; and the rule must be discharged.

The King v. the Sheriff of London.

2. East, 241. Feb. 12, 1802.

A rule to bring in the body, tested on the day of the return by the sheriff of *cepi corpus* though issuing afterwards in the vacation, is irregular.

THIS came on upon a rule for setting aside an attachment against the sheriff for not bringing in the body, in a cause of *Duffy v. Brooks* and others. On the 24th of *November* 1801, a special *capias* issued, returnable in 15 days of *St. Martin*; to which the defendants gave a bail bond; the writ was returnable the 25th. On the 26th, the rule was served to return the writ; on the 27th the sheriff returned *cepi corpus*. On the 2d of *December*, bail above was put in, which was excepted to and notice thereof served on the 7th: and on the 9th a notice of justification was served for the first day of *Hilary* term. On the 7th of *January*, 1802, the rule was served to bring in the body; which rule bore *teste* the 27th of *November* preceding, being the day on which the sheriff returned *cepi corpus*. On the 23d *January*, the bail were rejected; and notice of adding and justifying was served for the 26th. On the 25th, an attachment was granted against the sheriff; and the rule for the attachment served on the defendant's attorneys on the 26th; and the attachment afterwards issued; and on the same day bail were added, but did not attend to justify. On the 27th, bail justified, but no proceedings were had to set aside the attachment till the 1st of *February*.

Yates shewed cause against the rule; and as to the principal objection, that the rule to bring in the body bore *teste* on the 27th of *November*, the same day the return of *cepi corpus* was made; he observed, that the rule, though tested on that day, did not in fact issue till the 7th of *January* following, and in fact after the return of *cepi corpus*; and that it was competent to the party to shew the true time of its issuing, as in other cases, in order to forward the justice of the case; and for the same purpose the fraction of a day may be allowed. And he cited *Stewart v. Smith*, 2 Stra. 866, and 2 Ld. Raym. 1567, where it was holden that a *scire facias* might be sued out against the bail on the day on which the *Ca. Sa.* was returnable, as the Court would intend that it issued after the sheriff's return to the writ against the principal; and also *Shivers v. Brooke*, 8 Term Rep. 628, where the same principal was recognized.

Lawes, contra, contended that the rule to bring in the body was irregular, being tested not only before the day given for the return of the writ, the rule to return the writ being served on the 26th of *November*, which would not expire (*Sunday* intervening) before the 2d of *September*, of which the sheriff might avail himself, though he in fact returned the writ before; but the rule to bring in the body was also irregular, because it bore *teste* on the 27th *November*, the day on which the return of *cepi corpus* was in fact made. Now according to *Hutchins v. Hird*, 5 Term Rep. 479, the sheriff ought not to be ruled to bring in the body, till the day after the expiration of the rule to re-

(a) His Lordship was in court when the case was argued.

turn the writ. And in *R. v. The Sheriff of Cornwall*, 1 Term Rep. 552, it was holden that a rule calling on the sheriff to return a writ, being tested in the term, subsequent, though issued in the vacation, was irregular; and an attachment grounded thereon was set aside.

Cur. adv. vult.

GROSE, J. delivered the opinion of the Court.

The question is, Whether the rule to bring in the body, being served in vacation, but appearing on the face of it to be made before the return, by the sheriff, of *cepi corpus*, be regular? And we are of opinion that, for the sake of congruity upon the face of the proceedings, the rule to bring in the body, which, from its nature ought not to be made till after the return of *cepi corpus*, is irregular, if it appear upon the face of it to have been made before such return. Therefore, the rule must be made absolute.

Blackburn v. Stupart.

2 East, 243. Feb. 12, 1803.

A defendant cannot be taken in execution twice on the same judgment, though he were discharged the first time by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on.

THE defendant was taken in execution at the suit of the plaintiff on the 31st of March 1798, and remained in custody of the sheriff's officer till the 4th of April, when he was discharged on an express undertaking that he should pay half the debt and costs then, and the other half at a future day, and that the judgment should stand as a security for the payment in three months; and if the money were not paid in that time, the defendant agreed that the judgment should be enforced by execution against his person or goods for the amount, and for the costs incident thereto. The defendant having made default, the plaintiff, long after the three months were expired, arrested the defendant for the remainder of the debt and the additional costs, which the defendant paid in order to procure his discharge: and then moved on a former day to set aside the execution, and that the money in the sheriff's hands should be refunded; and, a rule *nisi* having been granted:

Park now shewed cause against the rule, and observed, that though it were true in general that a person could not be taken in execution twice on the same judgment; yet a defendant might waive that privilege by an express agreement; and that this distinguished the present case from that of *Tanner v. Hague*, 7 Term Rep. 420, where there was no such express agreement.

Erskine and *Espinasse*, contra, relied on *Tanner v. Hague* and *Thompson v. Bristow*, Qto. Barnes 205, as in point.

And of that opinion were the Court: and

GROSE, J. said, that it would be very dangerous to permit the law to be unsettled in this respect: which is, that a person cannot be taken in execution twice on the same judgment, whether he had so agreed or not: and therefore, though the defendant's conduct had been very scandalous, yet the rule must be made absolute(1).

(1) Vide *Yates v. Rensselaer & al.* 5 Johns. 384.

The King v. The Inhabitants of Great Marlow.

2 East, 244. Feb. 12, 1802.

After an appointment of 4 overseers for a parish by the magistrates at one meeting, they are *functi officio*; and no other magistrates can afterwards, upon the claim of one of the persons so appointed to be exempted, appoint another in his place; but the party must appeal to the sessions to get his discharge. And this objection to the second appointment may be disclosed to this court on affidavit, upon the removal of the appointment hither by *certiorari*, who will thereupon quash the same. *Semble* also, that the magistrates making the appointment must be together at the time the act is done.

A RULE was granted in the last term, calling upon the prosecutor to shew cause why a certain warrant of appointment of *James Field* to be one of the overseers of the poor of the parish of *Great Marlow*, in the county of *Bucks*, should not be quashed, upon notice of the rule to be given to the said *J. Field*. This was obtained on reading the said warrant of appointment returned by *certiorari* into this court, and also upon the affidavits of *H. Goldsmith* and others; which stated, that Sir *W. C.* and the Rev. *T. P.*, two Justices of the Peace for the said county, met at *Great Marlow* on the 18th of *April* last, and did then and there, by warrant under their hands and seals, appoint *J. Webb*, *J. Johnson*, *J. Gosling*, and *R. J. Oxlade*, to be overseers of the poor of the said parish. That on the 2d of *May* last, another instrument, purporting to be a warrant appointing *J. Field* overseer of the said parish, was signed by *T. W. Esq.*, another magistrate of the county, and on the 25th of the same month, was signed by the said *T. P.* (one of the magistrates first mentioned), who was not present when the said *T. W.* signed the same: nor was the said *T. W.* present when the said *T. P.* signed it.

In answer to the rule, it was sworn that the two last-mentioned magistrates met at *Great Marlow* on the 2d of *May*, when *J. Gosling*, one of the overseers first appointed, came before them, claiming to be exempted from serving parish offices by virtue of a certain certificate of an appointment (annexed to the affidavit), dated 6th *March* 1795, whereby it appeared that he had been sworn one of the yeomen in ordinary of his Majesty's body guard. That the two magistrates, conceiving it right to exempt him, did accordingly do so: and in his stead did proceed to appoint the said *J. Field*, a substantial householder of the parish, who was agreed by the other overseers and several other parishioners present at the meeting to be a proper person. That the appointment was accordingly directed to be made out, and the said *T. W.* signed the same at the time, conceiving that it was also signed at the same time by the other magistrate: and that if it were not so done, it was by the mistake of the clerk. That at the said meeting *J. Gosling* declared that he had not and would not act as overseer under the first appointment, conceiving himself to be exempted.

Gibbs and *Reader*, against the rule, took a preliminary objection, that the court could not look into affidavits, in order to quash the appointment, which was good upon the face of it: but that the objection, if any, should have been taken upon appeal to the sessions: and that without having recourse to the affidavits, no objection could arise from the number of overseers before appointed for the same parish being sufficient in law, as the first appointment was not returned before the court by *certiorari*.

Park and *G. N. Best*, in support of the rule, contended, that the objection to the appointment might be disclosed by affidavit: that it must have been so done in the case of *The King v. The Overseers of Bridgewater*, Cowp. 139, and in *Rex v. Butler*, 1 Blackst. 649, and 1 Const. 10, and *Rex v. Merchant* and *Allen*, *ibid.* 21. For in no other way could the facts there stated have appeared to the Court. That it was clear the appointment in question was bad for these, amongst other, reasons: 1st, That it was a judicial act, and

ought to have been executed by both the magistrates at the same time, according to *Rex v. Forrest*, 3 Term Rep. 38: and 2dly, that the magistrates had no authority, after the first appointment made of four overseers, to appoint another, except in the three cases provided for by the stat. 17 Geo. 2. c. 38. s. 3, namely the death, removal, or insolvency of one of the overseers; neither of which had happened here. And that objection might be taken here on removal of the appointment by *certiorari*, without appealing to the sessions in the first instance.

LAWRENCE, J. The jurisdiction of this court to examine into the legality of the appointment in the first instance may arise on this, that if there were a proper number of overseers legally appointed before, according to the provisions of the statute, a subsequent appointment of another overseer is merely void; the magistrates having no jurisdiction to make it. And the want of jurisdiction in the magistrates below is always a sufficient ground for the interference of this Court.

The Court, being desirous of making inquiry how the practice stood relative to the hearing of affidavits in support of objections against appointments of magistrates, which, upon the face of them, were good, directed the matter to stand over: and on this day, after hearing cause shewn upon the affidavits, in answer to the rule, when the former preliminary objection was also insisted on, they delivered their opinions.

GROSE, J. When this matter was first mentioned, I thought that the objection should have been made on appeal; but I find now that the appointment may be brought hither by *certiorari* in the first instance, for the purpose of being quashed. And upon looking into the affidavits, which upon inquiry is found to be the usual practice, the appointment appears to be bad on both the grounds of objection taken. When the first appointment was made, on the 19th of April, of four overseers, all further jurisdiction of the magistrates in that respect was at an end. It was not competent for other magistrates to make a new appointment in cases not authorized by the statute. Then again, both the magistrates ought to have been present when the appointment was executed: instead of which, many days elapsed between the signature of the one and the other, and they were not together when the act was done. This is essentially necessary to be observed, and much inconvenience may ensue from a contrary rule. Therefore, the appointment appearing to have been illegally made must be quashed(1).

LAWRENCE, J. The objection to looking into affidavits upon such a subject, for the purpose of founding an objection to the appointment, was never taken before. The *Bridgewater* cases, *Rex v. Holloway* and others, and *Rex v. Beale* and others, E. & T. 14 Geo. 3, and the *Milbourne Port* cases, *Rex v. Baunton* and others, and *Rex v. Scott* and others, M. & H. 15 Geo. 3., were all motions to quash appointments of overseers, which came on upon affidavits, besides the cases mentioned at the bar. I find it also to be the common practice with respect to orders made by commissioners of sewers. Then as to the merits of this case: it must be taken on these affidavits, that the magistrates who first met did appoint four persons to be overseers of the poor for the parish: that one of the persons so appointed afterwards applied at a subsequent meeting of magistrates to be discharged on the ground of an exemption claimed by him. But after the former appointment it was not competent to the other magistrates to receive his excuse; but the party should have appealed to the sessions, who might have allowed his excuse. But till that were done he became overseer completely by the appointment under the hand and seal of the magistrates, and he might have been indicted for not executing the office. I should also be sorry to relax the rule that the two magistrates should be together when the

(1) *Vide Batty v. Gresley & al.*, 8 East 327, and the Reporter's note thereto. Bac. Abr. 319, *in notis*, (Wils. ed.)

appointment is made : otherwise it will be hard to say to what length of litigation the question may not be carried, if it be to depend on the mind of the magistrate who first signed going along with the other, at the time he signs, as has been argued in support of the order. However, it is not necessary to decide any thing on that ground in the present instance.

LE BLANC, J. The Court has been in the habit of entertaining motions of this sort on affidavit ; which brings the question to the validity of the appointment in the present instance. Now the first appointment being good, all was at an end, and the other magistrates had no jurisdiction to make another appointment. Then, on the other point, we cannot say that an appointment under hand and seal, and a mere concurrence to such an appointment by another, are the same thing.

Appointment quashed.

Prince v. Blackburn.

2 East, 250. Feb. 12, 1802.

If a subscribing witness to a deed be abroad out of the jurisdiction of the court, and not amenable to its process at the time of the trial evidence of his hand-writing is admissible ; though it do not appear whether he be domiciled or settled abroad.

DEBT on bond. Plea, *Non est factum*. This case was tried the day before at the sittings before *Le Blanc, J.*, when a verdict was taken for the plaintiff, with leave for the defendant to move to set it aside and enter a nonsuit. And such motion being now made accordingly, the learned Judge reported the evidence to be this : There were two witnesses to the bond, one of whom was dead ; the other was *Richard Prince*, son of the plaintiff, who left this country for *America* in *October* last before the action was brought. Two letters had been received from him since, one dated at *New-York*, the other at *Baltimore*, in *America*. It further appeared, that previous to his departure he was a single man living with his father as part of his family, on whose account he went to *America* to transact some business. But the witness who proved this at the trial, who was a servant in the plaintiff's family, did not know whether the son were expected to return to this country or not : he was not acquainted with the son's intentions. Under these circumstances the evidence of the hand-writing of both the witnesses was admitted, on the ground that the subscribing witness who was still living, was out of the reach of the process of the Court.

Scarlett, in support of the rule prayed for, contended that such evidence was not admissible without proof that the subscribing witness was domiciled, or settled abroad. The admission of such evidence in any case where the subscribing witness is alive is a modern practice, and a relaxation of the old rule, which required the production of the witness himself to whom the parties had mutually agreed to refer for such proof. And there is good reason for such strictness, as material circumstances may arise out of his examination *viva voce*, which cannot otherwise be shewn. In all the cases in which evidence of the hand-writing has hitherto been received, the witness was either proved to be dead, or to have become incompetent, or to be actually domiciled, or settled abroad, and therefore not likely to return within reach of the process of the Court ; but in no case has such secondary evidence been admitted where the absence was only temporary, which is the fair presumption arising from the evidence given in this case. [*Le Blanc, J.* That fact was left quite indifferent upon the evidence.] The *onus probandi*, that the subscribing witness was domiciled abroad, lay upon the plaintiff before the secondary evidence could be received. By the stat. 26 Geo. 3, c. 57, s. 38, for facilitating the proof of deeds executed in *India* in the courts of *Great Brit-*

ain, and *vice versa*, the legislature have expressly required that the party offering the deed in evidence shall prove that the subscribing witness, whose hand-writing is to be proved, is resident in the other country, before such proof is admitted. In *Barnes v. Trompowsky*, 7 Term Rep. 266, Lord *Kenyon* confined the admission of this secondary evidence to cases where the subscribing witness *resides* abroad, &c. and said there was neither necessity nor convenience in relaxing the rule further than had been already done. In *Wallis v. Delancy* there cited, the instrument was executed abroad. So it was in *Adam v. Kerr*, 1 Bos. & Pull. 360; and in another case, *Peake's N. P.* 99, before Lord *Kenyon*, the witness, whose hand-writing was allowed to be proved, was domiciled in *France*. And there is good reason for not relaxing further the strict rule; as otherwise advantage may be taken of the temporary absence of a subscribing witness to sue upon instruments which would be shewn to be void and illegal if the witness were examined in person.

Mingay and *Lawes* shewed cause against the rule in the first instance; and relied on the rule laid down by *Buller, J.* in *Adam v. Kerr*, that where the subscribing witness was beyond the reach of the process of the Court at the time of the trial, the evidence of his hand-writing should be admitted. The fact of his intending to return to this country or not (which can only be known to himself) cannot furnish any rule to go by, and must often be a matter impossible for the plaintiff to give evidence of. But the presumption in the present case is, that he will not return.

The Court refused the rule; considering that as the witness was out of the jurisdiction of the Court, so as not to be amenable to its process, the secondary evidence was properly admitted(1).

(1) Vide Editor's note to *Call v. Dunning*, 4 East 55, where the authorities are collected and classed.

insolvent debtors' act (41 Geo. 3. c. 70.) on the 4th of *August* 1801: having previously, as required by that act, delivered in a schedule of his estate and effects, containing a small freehold estate in the county of *Wills*.

The 16th section of the act enacts, "That all the estate, right, title, interest, and trust of such debtor in and unto all the real estate, &c. and all the personal estate, &c. shall, *immediately after* such adjudication (i. e. that the debtor is entitled to the benefit of the act, &c.) be, and the same is hereby *vested in the clerk of the peace* of the county, &c.; and every such clerk of the peace, &c. is hereby directed and required to *make an assignment and conveyance* of every such debtor's estate and effects, *vested in such clerk of the peace, &c. as aforesaid* to such creditor or creditors of the said debtor as the justices at any general or quarter sessions of the peace, &c. shall order and direct, &c. which assignment and conveyance shall be good and effectual in the law to all intents and purposes whatsoever, &c. to *vest the estates thereby assigned and conveyed* in the party or parties to whom the same shall be so assigned and conveyed, his heirs," &c.

The order to assign and convey the estate in question to the lessor of the plaintiff was made by the justices on the said 4th of *August* last, and the conveyance to him by the clerk of the peace of the county of *Wills* accordingly bore date on that day; but in fact it was not executed until the 6th of *September*, and the demise was laid on the 2d of the same month. Under these circumstances *Le Blanc*, J. nonsuited the plaintiff at the trial at the last assizes at *Salisbury*, considering that his title did not accrue till after the day of the demise laid.

Gibbs now moved to set aside the nonsuit, suggesting that though the statute vested the insolvent debtor's estate in the clerk of the peace in the first instance, and until an assignment and conveyance were made by him to some creditor under the direction of the justices; yet after such order, and the execution of the assignment accordingly by the clerk of the peace, the creditor was in by relation to the time of the discharge, when the estate was out of the insolvent debtor; by analogy to the statutes of bankrupt, where after an actual assignment the assignees of the bankrupt were in by relation to the act of bankruptcy, when the bankrupt's estate was divested by the act of the law.

The Court, however, thought the nonsuit proper; the act of parliament having positively vested the insolvent debtor's estate in the clerk of the peace until his subsequent assignment and conveyance of it to the creditor pursuant to the order of the justices. And they observed, that if another demise by the clerk of the peace had been laid, it would have obviated any inconvenience which could have arisen in this case from the lessor's want of knowledge when the assignment was actually executed.

Rule refused.

Stephens v. Crichton.

2 East, 259. May 13, 1802.

The party succeeding is not entitled to the costs of examining witnesses on interrogatories, or taking office copies of depositions: but each party applying pays his own expence, unless it be otherwise expressed in the rule.

ERSKINE moved that the Master might review his taxation of costs in this case, he not having allowed the defendant the expences of taking interrogatories of his own witnesses, and the office copies of depositions of the plaintiff's witnesses taken before commissioners abroad. The action was brought to recover damages on account of the defendant's ship having run down the plaintiff's: and after notice of trial given and countermanded, it was agreed that as several of the witnesses on either side were going abroad, they should respectively be examined upon interrogatories, and that

the depositions of others of the plaintiff's witnesses who were then abroad should be taken before commissioners there. The plaintiff at the trial read many of the depositions made by his own witnesses; but made so weak a case that it became unnecessary for the defendant to read his depositions in answer; (but which were now sworn to be material to the merits of the case); and a verdict passed for the defendant. It was now insisted, that the defendant was entitled to be allowed the costs in question as much as in the case where a party subpoenas material witnesses who attend at the trial, but are not examined on account of the failure of the plaintiff's case, or to save the time of the Court.

The Court, however, on consulting the Master, said that the practice had been against the allowance of costs to the party succeeding in such cases. They referred to an anonymous case in E. 24 Geo. 3, (*Hullock on costs*, 437,) where the rule was laid down that the costs of examining witnesses upon interrogatories were always borne by the party obtaining the rule for such examination, and did not abide the event of the cause unless so ordered by the Court. Lord *Ellenborough* observed that however desirable it was that the taxed costs should really indemnify the party who was ultimately found to be in the right; yet it was necessary to keep a check upon the very great expence to which this might lead, and to incur which the interest of unconscientious agents might afford a temptation. That there was the less reason to break in upon the rule in this case, as the examination of witnesses on interrogatories in any case was a matter of indulgence and consent.

Rule refused.

Collett and Another v. Lord Keith.

2 East, 260. May 14, 1802.

In justifying a trespass under the process of a foreign court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior courts: but at any rate, a plea which only states that the court abroad was governed by foreign laws, that the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question in such court, having competent jurisdiction in that behalf, *et taliter processum*, &c. that the defendant was ordered by the said court, having competent authority in that behalf, to seize the property, is bad; being too general; and not giving the plaintiff notice whether the defendant justified as an officer of the court, or party to the cause; or of what nature the charge was, or by whom instituted, or what the order of seizure was, whether absolute or *quousque*, &c.

TO an action of trespass *vi et armis* for seizing and taking the ship and goods of the plaintiffs at the *Cape of Good Hope*, to wit, &c. and converting the same to the defendant's use; the defendant, amongst other pleas, pleaded by way of justification, that a little before the said time when, &c. the said settlement of the *Cape of Good Hope* being a foreign, to wit, a *Dutch* settlement, was conquered and taken by the King in open and lawful war from certain enemies of the King, and by virtue of that conquest from thenceforth until and at the said time when, &c. remained and was in the lawful possession of the King; and that the same settlement, not having received laws from his Majesty, or from any other lawful authority since the said conquest, the former laws and customs, courts and jurisdictions of the said settlement being foreign, viz. *Dutch* laws and customs, courts and jurisdictions, from the time of the same conquest until at the said time when, &c. remained and were in full force in and throughout the said settlement for the regulation and government of the same, to wit, at, &c. And the said settlement, so being in the lawful possession of the King, and the same laws and customs, courts and jurisdictions, so being in full force as aforesaid, the said ship with the said

goods, &c. on board thereof, a little before, and also at the said time when, &c. was at a certain place called *Simon's Bay*, part of the said settlement, and within the jurisdiction of the supreme court of judicature there, to wit, at, &c. the same court then and there being a foreign, to wit, a *Dutch* court, then and there lawfully subsisting, and governed by the same foreign laws and customs, and lawfully administering the same laws and customs in the said settlement for the regulation and government of the same, to wit, at, &c. And the said ship and goods, &c. so being within the jurisdiction of the same court a little before the said time when, &c. certain legal proceedings according to the same foreign laws and customs had been and were instituted, and until at and after the said time when, &c. continued and were depending in the same court against the said ship and goods, &c. the same court having lawful and competent jurisdiction and authority in that behalf, to wit, at, &c. : and such proceedings were thereupon had in the same court, that the defendant afterwards and a little before the said time when, &c. to wit, on, &c. was according to the said foreign laws and customs empowered and authorised and ordered by the same court, having lawful and competent jurisdiction and authority in that behalf, to seize and take the said ship and goods, &c. being within the jurisdiction of the same court, and to detain the same under the authority of the same court, to wit, at, &c. By reason whereof, &c.

To this plea there was a demurrer, and the following special causes were assigned, viz. that it does not appear by the said plea when or what legal proceedings had been, or were instituted, or depending, in the supreme court of judicature, in the said settlement, against the said ship and goods, &c. nor for what cause the same had been or were instituted : and also for that it does not therein appear nor is alleged on what account, or by reason of what facts the said court ordered, or had power to order, the seizure or detention of the said ship and goods, &c. ; nor by what law or customs, or by what proceedings, or how, or in what manner the defendant was empowered, authorised, or ordered by the said court to seize and take the said ship and goods, &c. : and also, for that it is not thereby alleged that any or what order, authority, process, decree, judgment, or sentence was made, issued, or pronounced by the said court respecting the said ship or goods, &c. or respecting the detention thereof ; and also for that no certain or material issue can be taken upon the said plea, &c.

This case was argued in *Michaelmas* term last, by *Giles* in support of the demurrer, and *Jervis*, contra ; and in this term, by *Gibbs* for the demurrer, and *Park*, contra.

In support of the demurrer, it was urged that there was no precedent in the books of a justification so general as this, nor any direct authority to warrant such a justification under the order of a foreign court : but that by analogy to justifications for similar acts done by virtue of process out of the courts in *England*, the plea was clearly bad. It is a general rule of pleading, that where a party justifies a trespass under an authority given, he must shew that authority. Co. Litt. 283. a. There is a difference, however, in this respect, between the party to the cause, and the officer who executes the process of the court ; the former must shew the judgment as well as the writ ; but the latter need only shew the writ under which he acts ; because he is bound at any rate to obey it within the jurisdiction of the court by which it is issued. Yet where the officer justifies together with the party, he is holden to the same strictness in pleading. These rules govern even where the justification is founded on process out of the superior courts at *Westminster*. *Cotes v. Michael*, 3 Lev. 20, *Tarlton v. Fisher*, Dougl. 671, *Philips v. Biron*, 1 Stra. 609; *Matheus v. Cary*, 3 Mod. 137, and *Lamb v. Mills*, 4 Mod. 378, are in point. But in justifying process out of inferior courts here, the party is holden to still greater strictness. Formerly, indeed, it was necessary for him to set forth all the proceedings ; but though that rule has been relaxed, still he must

shew that the inferior court had jurisdiction of the subject matter; that the cause of action arose within the jurisdiction; that a plaint was regularly levied, and (in case of judicial process) that judgment was thereupon obtained, and that the writ or process issued to the proper officer, who thereupon executed the same. The officer, indeed, need not shew that the cause of action arose within the jurisdiction of the court, though he must set forth such jurisdiction; because that in the case of inferior courts is a fact of which the Judges are not bound to take cognizance: he must also shew that such a plaint was levied of which the inferior court had jurisdiction, and that such proceedings were had, &c.; that certain process issued directed to him as an officer of the court, which was delivered to him to execute, and that he did accordingly execute the same. *Gwynn v. Poole*, 2 Lutw. 935. *Moravia v. Sloper*, Willes, 30, *Morse v. James*, Ibid. 122, and *Rowland v. Veale*, Cowp. 18. In no case is it sufficient either for the officer or the party to plead generally that he committed the trespass complained of by order of such a court; for he might as well justify it by saying that he did it according to the law of the land. The proceedings of the King's courts in the Colonies (to which this case bears the greatest analogy) cannot in reason be considered as entitled to higher credit than the proceedings of the courts here. They can at most only be put on the same footing with our inferior courts; and those who claim or justify under them must at least be holden to as strict rules in pleading as apply to justifications under the process of such courts. This is evident from considering the principle on which all the authorities on this subject proceed. The reason why a defendant may justify more generally under the process of a superior than of an inferior court is, because the judges are in the first instance presumed to know the extent of the jurisdiction; and therefore it is not necessary to allege that the superior court had jurisdiction of the subject matter, or that the cause of action arose within such jurisdiction; both which are necessary to be alleged in the case of inferior courts; because the court are not presumed to be cognizant of the facts until brought before them by proper averments. This necessity, therefore, cannot be less in regard to justifications under the process of foreign courts, of which the Judges here must be taken to be wholly ignorant till disclosed to them by pleading. Suppose the ship had been taken in execution by the sheriff under a writ of *fiери facias*, and this action of trespass brought against him; though he would only state in his justification that the plaintiff in the former action sued out a writ of *fiери facias* under a judgment before that time recovered in a certain action against the former defendant, which writ was directed to him as sheriff, whereby he was commanded, &c. and that it was delivered to him to be executed, and that he did execute it accordingly by taking the goods, &c.: yet in addition to those facts, their previous knowledge of the law, which the law itself presumes them to have, enables the Judges to know that the writ issued in a civil proceeding; such whereof the court had cognizance; that the writ of *fiери facias* was the proper process in such a suit; and that the sheriff was the proper officer to whom it ought to be directed, and by whom it should be executed: upon the whole, therefore, they would have sufficient assurance that the proceeding itself, so far as regarded the sheriff, was regular, and that the process itself was properly executed. But wherever the jurisdiction is unknown to the court, all those matters which they are in the other case presumed to know, and which are necessary to constitute the entire justification of the party, must be supplied by adequate averments: there is therefore an additional necessity imposed on the party, namely, to state the law by which such proceedings are justified, as well as the proceedings themselves; for the law of a foreign country is no more than a fact here, which must be averred, and cannot be presumed. Then as it must be admitted, that as a justification so general as the present would not suffice to protect a sheriff acting under the

process of one of the superior courts, *a fortiori* it cannot protect the defendant acting under a jurisdiction wholly unknown to the law. Here the description of the court itself is uncertain, as to its nature and general jurisdiction. The plea states, "that certain legal proceedings had been instituted," &c. but it does not state what those proceedings were, whether criminal or civil, or by whom instituted, or on what account. It states no previous complaint or charge; but that such proceedings were thereupon had: so that it does not appear upon what such proceedings were had. It is said, that all this was done according to the foreign laws and customs; but it does not shew what those laws and customs were. It states that the defendant was empowered, authorized, and ordered to seize the ship, &c.; but it does not set forth the order by which he was so authorized. It is not even averred that he was the person to whom such order was directed, or that he was bound to obey it. It cannot be collected whether this were mesne or judicial process; nor for how long he was to seize or detain the ship; nor for what purpose. All these matters would have been necessary to be shewn in analogy to cases of inferior jurisdiction here, even if it had distinctly appeared that the defendant was an officer of the foreign court, and bound to execute its process: but nothing of that sort appears; and therefore he stands in the same situation as a party at whose instigation the proceedings were had; in which case it is not only necessary to state the writ authorizing the seizure, but also the judgment on which it is founded.

For the defendant it was insisted, that there was no analogy between courts of inferior jurisdiction here and foreign courts, and that the reasons on which the cases had proceeded in respect of the former did not apply to the latter. The defendant justifies under the orders of a court in a foreign settlement averred to be governed by *Dutch* laws, though at that time in the possession of the king as a conquest: which, according to *Calvin's* case, 7 Co. 17. b. and *Blankard v. Galdy*, Salk. 411, is consonant to the law of *England* in the case of a new conquest till our own laws are there promulgated by the king. The plea further states, that the property seized was within the jurisdiction of the supreme court of judicature there; and that the defendant was by the order of that court, which is averred to have had competent jurisdiction in that behalf, empowered and ordered to seize and detain it. This is the substance and sense of all justifications of this kind under our municipal courts; and it would have been useless and nugatory to have gone further and to have set out what those foreign laws were, and what the process of the court was; because, be they what they might, this court could not tell whether the proceedings had been regular or not; having no previous knowledge of the foreign law wherewith to compare them: nor could it sit as a court of review upon the justice or legality of the decision of a foreign independent judicature. It has been always holden, that the judgment of a foreign court of competent jurisdiction is conclusive upon the subject matter of the adjudication, and that it cannot be questioned in any collateral proceeding. For which they cited *Hughes v. Cornelius*, 2 Show. 232. *Burroughs v. Jamineau*, (a) *Boucher v. Lawzon*, Rep. temp. Hardw. 99. *Galbraith v. Neville*, B. R. E. 29 Geo. 3. Dougl. 5. b. n. 2. *Phillips v. Hunter*, 2 H. Blac. 410, per Eyre, C. J. *Geyer v. Aguilar*, 7 Term Rep. 681, and particularly *Rex v. Gardell* (b); where to an indictment for an assault by the defendant, which was committed in turning the prosecutor out of *Queen's College, Oxford*, the defendant gave in evidence an order of expulsion of the prosecutor by the college, and his (the defendant's) acting as their officer in enforcing it. The prosecutor in answer offered to prove the invalidity of the order by reference to the constitution of

(a) M. 18 G. 1 cited in Rep. temp. Hardw. 87. 12 Vin. Abr. 87, pl. 7, and 2 Stra. 783. S. C.

(b) Cited in the *Dutchess of Kingston's* case, 11 St. Tr. 208.

the college: but the Judge at *nisi prius* rejected the evidence, and held the order of expulsion conclusive; and this court afterwards approved of his decision. The same doctrine was strongly enforced by *Eyre, C. J.* in *Phillips v. Hunter*. There is an additional reason for not requiring the same strictness in pleading such a justification under the process of a foreign court as is usual with respect to our own courts: because the defendant is as much a stranger to the course of their proceedings as the plaintiff; and he has no more the means of informing himself of them or getting copies of them than the plaintiff. It may be otherwise in the case of a plaintiff coming here as a volunteer to derive some benefit to himself grounded on the proceedings of a foreign court, of which in that case he would be bound to inform himself. But it does not even appear that the defendant instituted the proceedings in the foreign court; for it is only stated, that certain proceedings *had been and were depending* against the ship and cargo, which refers to an antecedent time. On the contrary, it is plain that the defendant must have acted as the officer of the court, because it is alleged that he was *ordered* by the same court to seize the property; which necessarily implies that the order was directed to him, and that he was under an obligation to obey it, the court having, as is expressly stated, competent authority in that behalf. For the reason before urged, it cannot be necessary to state the precise terms of the order, because the court could not, as in the case of our own process, know whether it were regular or not in the frame of it. Perhaps too it was a mere verbal order, as in 2 Roll. Abr. 558. C. pl. 2.; and every thing is to be presumed in favour of the regularity of the proceeding of a foreign court, unless the contrary appear. The same presumption is made even in the case of inferior courts at home, provided the jurisdiction sufficiently appear. *Sollers v. Lawrence*, Willes, 413, and *Moravia v. Sloper* Ibid. 34. So in *Ladbroke v. James*, Ibid. 199—201, it was holden sufficient, after stating facts which gave a limited court jurisdiction, to allege generally that the court gave such a judgment. *Willes, C. J.* there said, that if it had appeared that the sessions had jurisdiction to discharge the insolvent debtor, it would have been sufficient to have said generally that the Sessions had discharged him; and that the court above could not inquire into any facts necessary to be done by him in order to obtain his discharge; of which the Sessions were the only and the proper judges. In *Otto v. Selwin*, 2 Lev. 131, the Admiralty Court warrant, under which the defendant justified the trespass, merely recited that a case was depending therein *de re maritima*, and commanded the defendant their officer to take the plaintiff; which was holden sufficient, without shewing the particular matter. In all cases the officer is more favoured in pleading than the party, and need only shew the writ or warrant without shewing the judgment(a); because the officer, who acts only ministerially, is at all events bound to obey the process; and the court, from their knowledge of such process, are enabled to see whether it were such as by the law he was bound to obey: whereas in this instance the view of the process can afford no information to the court as to its legality; and therefore it would have been nugatory to have set it out. Upon this principle, where a party had seized and condemned goods in *Ireland* under the dominion of the King of *Denmark*, by a grant from that prince, and under their law, and afterwards coming into *England* was sued for such acts by the former owners of the goods, Lord *Nottingham*, in *Baldolph v. Bamsfeld*, Finch's R. 133, granted a perpetual injunction, saying, that what was done there was according to their law; and that it was not properly triable here whether the King of *Denmark* had power to make such a grant. So here it is not properly triable whether the supreme court of judicature at the *Cape* had power to make such an order to the defendant; but the only

(a) *Cotes v. Mitchell*, 3 Lev. 10. *Britton v. Cole*, 1 Salk. 409, and 5 Com. Dig. 322. tit. Pleading, 3 M. 24.

material question is, whether in fact such an order were made? which is sufficiently stated for the plaintiff to put it in issue by the common replication *de injuria*, &c. This case then falls within the scope of those authorities where it is sufficient, even in the case of an inferior jurisdiction, to plead *tali-ter processum est*; as in *Gwynne v. Poole*, 2 Lutw. 937, *Truscott v. Carpenter*, 1 Ld. Raym. 230, *Johnson v. Warner*, Willes, 528, *Tilley v. Foxall*, *ibid.* 668, *Adams v. Freeman*, 2 Wils. 5. Here it answers every reasonable purpose to aver generally, that the foreign court had jurisdiction to do the act which they ordered to be done. And no hardship is hereby cast on the plaintiff; because it is a matter *in pais*, and the affirmative of the proof lies on the defendant pleading it. The reason why such matters must be pleaded specially when arising here is from a technical distinction between matters of record, and matters not of record, the former of which must always be pleaded with a *prout patet*, &c.; but no such distinction prevailing in respect to judicial proceedings abroad, the same necessity does not exist; and *non constat* but that all the proceedings in this case were *ore tenus*.

In reply, it was said, that the whole of the defendant's argument turned on the assumption that he was an officer of the court; which did not appear; and it was admitted that the party who put the proceedings of any court in motion, (which, for aught appeared to the contrary, was done by the defendant himself,) was bound to shew that they were regular. That the question was not, how far the sentences of a foreign court were conclusive, but how they were to be shewn in pleading. That the plaintiff could not dispute the judgment of the foreign court, because the defendant had not shewn what it was. That the rule requiring this to be set out by the party was not merely for the information of the court, but also to enable the other party to meet the charge. That admitting the proceedings might be pleaded generally, the objection held that they were not set out at all; so that the plaintiff could not even tell the nature of the charge. That this applied as well whether the proceedings were *ore tenus* or in writing: and in the case in 2 Rol. Abr. 558, the order though made *ore tenus* was set out. That all the cases proved that where it was necessary to shew a jurisdiction in the court, as in the case of inferior courts, it was not enough to aver such jurisdiction generally, but such facts must be stated as shewed that the case was within it. That the defendant could not be prepared to prove the legality of the seizure unless he were cognizant of the facts; and therefore, there was no more hardship in requiring him to plead them in this than in other cases.

GROSE, J.(a). The defendant justifies the trespass complained of, as having been done under the authority and by the order of the supreme court of judicature at the *Cape of Good Hope*. In pleading such justifications the law makes a difference between the party claiming the aid of such court, and the officer of the court who is bound to obey its orders, in favour of the latter. In the present case, therefore, it would be most for the advantage of the defendant to consider him as such officer; for as party, there is not the smallest pretence to say that the plea will justify him. But considering him to have acted as officer, it was incumbent on him to have shewn that by his plea; and that he acted under a court of competent jurisdiction; that such an order issued to him; and that he has not transgressed it in doing what he has done. Then trying the validity of this plea by those rules, it cannot be supported: for though in one part the defendant affects to consider himself as an officer of the court abroad, by stating that he was *ordered* by that court to do the act complained of; yet that does not shew that he was the officer of the court, but he should have averred that he was so, and have shewn that the order applied to him as such. For this purpose he should have stated what the order

(a) Lord Ellenborough, having been concerned as counsel in the cause, declined giving any opinion.

was; that the court might see that he was bound to obey it, and that he had not transgressed his authority in what he did. But nothing of that sort appears; and if the parties were to go to issue on this plea, I do not see what the plaintiff is to be prepared to answer. The plea is abundantly too general, and answers none of the purposes for which such a plea was intended. I am aware of the inconvenience to a defendant in such a case in holding him to greater strictness in pleading; but that cannot alter the law; though perhaps the difficulty which has occurred may suggest the propriety of some legislative provision on similar occasions. It is our province only to decide whether this be a good justification in point of law according to the rules which have governed in similar cases: and if it be not, we must give judgment for the plaintiff. As to what has been urged respecting the jurisdiction of the court, I observe that it is stated that the ship and cargo were within the jurisdiction of the court, which was governed by foreign laws, and that certain legal proceedings according to such laws were instituted and depending in the court against the ship and cargo, the court having competent jurisdiction in that behalf, &c. But the defendant ought to have shewn what the foreign law was which gave jurisdiction to the court abroad in this respect; for that is a fact; and that the subject matter was within the jurisdiction; and how it became amenable to the process of the court. But however this may be, the defendant at any rate might have shewn more fully how he was authorised to act in the manner he has done; and I am clearly of opinion that the justification pleaded is too general.

LAWRENCE, J. I agree in opinion that this plea is bad: in saying which I confine myself merely to the generality of it; in consequence of which the plaintiff cannot be prepared to answer it. How far the law is to be carried in favour of the officers of courts in this or any other country; or how far it is necessary to state facts which shew that the proceedings were within the jurisdiction of the several courts, are questions which I shall not at present particularly inquire into. There may perhaps be a distinction, contended for between justifications pleaded under the process of foreign courts, and such justifications under our own courts; and it may be sufficient in the former case to allege more generally the subject matter, and that the parties were within the jurisdiction, than in justifying under the process of inferior courts in this country; in which case it is necessary not merely to allege generally that they had jurisdiction over the subject matter, but to state what the jurisdiction was, and then allege such facts as may enable the superior court to judge whether the court below had jurisdiction of the cause or not. However, I give no opinion on these points, because at all events this plea is so general that it is impossible for the plaintiff to guess what the defendant means to rely on at the trial. It does not state what the charge was, or who were the parties to it, or at whose instance the order was given, or at what time, or for what object. It is not necessary however for me to say how far such a plea should go: it is enough to say that this is too general.

LE BLANC, J. The principal object of putting a justification of this sort on the record is to give the other party notice of what he is to answer: and where no case has been decided or rules laid down with respect to such justifications under foreign jurisdictions, we can only reason from analogy to the precedents of our own courts. How far it may be necessary to pursue that analogy it is not now necessary to state, because this plea at all events falls very short of those precedents. It is not sufficient barely to state that the ship and cargo were within the jurisdiction of the foreign court, where it is not stated what the cause of complaint was, or whether it were a criminal or civil proceeding which was instituted, or by whom the charge was preferred. It is only stated, that certain legal proceedings had been and were instituted; of what nature does not appear; nor is any judgment or decision of the court stated thereupon. The plaintiff cannot tell whether these proceedings were

instituted against the ship for any offence committed by any of the persons on board, which subjected her to forfeiture; or whether it were a civil complaint to recover damages, to which the ship was liable. Even supposing Lord *Keith* to have been an officer of the court, which is not stated in the plea, at least he should have stated what the order was by virtue of which he made the seizure; whether it were an order to compel appearance or to satisfy the party complaining in execution; whether it were for an absolute seizure, or merely *quousque*, until such an act done: for then the plaintiff might have replied that he had appeared, or had done the thing required, or had satisfied the damages to the party; and then have new assigned a subsequent trespass. All this was necessary to be stated, because the merits of the case might ultimately turn upon it: but nothing of the sort is shewn; and therefore I am clear that there ought to be

Judgment for the Plaintiff.

The King v. The Inhabitants of Sowerby.

2 East, 276. May 15, 1802.;

A person cannot gain a settlement by hiring and service with the son of a certificated man continuing to reside in the certificated parish with his mother after the father's death, as part of her family; though the son were of age, and carrying on business for himself; such circumstances not amounting to an emancipation.

TWO justices by an order removed *R. Murdock* and his children by name from the parish of *St. Mary* in the town and liberties of *Beverley* in the East Riding, to the township of *Sowerby* in the North Riding of the county of *York*. The sessions on appeal confirmed the order, subject to the opinion of this Court on the following case:

Richard Stokell in 1745 went with a certificate, in which he only was named, from *Darlington* to *Sowerby*; and during his residence there under that certificate, his son *Ralph Stokell* was born. *Richard Stokell* died; after whose death *Ralph* his son, being arrived at manhood, followed the business of a twine-spinner at *Sowerby* for many years: and about 1780, which was ten years after the death of his father, he engaged the pauper *R. Murdock* as his servant in the above business; and the pauper continued in such service at *Sowerby* for eleven years; during which period he was, whilst unmarried, hired to and served him for a year. *Ralph Stokell* also during these years hired a boy to turn the wheel necessary in twine-spinning. When the pauper was hired for and served a year as above mentioned, *Ralph Stokell* was a bachelor, and lived in a house at *Sowerby* with his mother, which she went to and rented after her husband's death, at about fifty shillings a-year: and he never left this house or his mother, except for a few weeks in harvest-time in one year. The mother had no concern in the twine-spinning business; and the pauper and the boy were the servants of *Ralph Stokell*, and not of his mother.

This case was first argued in the last term, when the Court, after hearing the counsel in support of the orders, directed them to be quashed; being clearly of opinion that *Ralph Stokell*, the son of the certificated man, continued to reside with his mother in *Sowerby* under the certificate granted to the father and his family, and therefore that the pauper could not gain a settlement by a hiring and service with *Ralph Stokell*. But a doubt being afterwards suggested from the bar, whether some cases which had not been adverted to before might not vary the consideration of the question, the matter was directed to stand over for further argument.

Holroyd now contended, in support of the orders, that *Ralph Stokell*, the pauper's master, was emancipated at the time of the hiring and service of the

pauper: and that if so, the pauper might gain a settlement by hiring and service with him in *Sowerby*, although the certificate remained in force with respect to the widow of the certificated man. The circumstances which emancipated *Ralph Stokell* from his surviving parent were the being of age and setting up in business for himself, and hiring servants of his own, whereby he became the head of a new family. In *R. v. Walpole St. Peter's in Norfolk*, Burr. S. C. 638, one who had enlisted as a soldier and was of age was holden to be emancipated, though he afterwards returned and lived as part of his father's family. But in *R. v. Halifax*, Burr. S. C. 806, a son under age, who occasionally resorted to his father's house, was deemed to continue part of the father's family, though he had bound himself out apprentice to another, and worked about the country in the way of his business. The circumstance of infancy also formed a principal ingredient in *R. v. Offchurch*, 3 Term Rep. 114, where Lord *Kenyon*, C. J. said that, ordinarily speaking, one of these things must happen before a son can be said to be emancipated; either he must have obtained a settlement for himself, or have become the head of a family, or at most he must have arrived at that age when he may set up in the world for himself. Here two of the circumstances concur. To which, in *R. v. Whitton cum Twanbrookes*, *Ibid.* 356, Lord *Kenyon* added the circumstances of the son's being of age, or marrying. With respect however to the mere circumstance of being of age, his lordship afterwards in *R. v. Roach*, 6 Term Rep. 252, corrected what he had before been supposed to say, and said that a son's being of age was not in itself an emancipation if he continued an unbroken residence in his father's family. But here there are the other concurring circumstances mentioned. Then if the son were emancipated, the stat. 12 Ann. st. 1 c. 18. s. 2, will not apply to prevent the pauper's gaining a settlement by the hiring and service. For in *Rex v. Darlington*, 4 Term Rep. 797—800, a certificate was holden not to include grandchildren, and only extend to the wife and children who continued part of the father's family. Lord *Kenyon*, C. J. said, that when a son became the head of a family, then the words of the stat. 8 & 9 W. 3 c. 30., public policy, and the convenience of mankind required that he should no longer be considered as part of his father's family, or be protected by the certificate granted to the latter. And in *Rex v. Heath*, 5 Term Rep. 583, it was expressly decided, that the son of a certificated person having married and living in a house of his own, thereby ceased to be under the protection of the certificate, and might gain a settlement like any other person in the certificated parish. It is true, there was a separation in fact there from the father's house: but that cannot make any difference, provided the son were emancipated by the means here stated: for without such emancipation, he would still have continued under the certificate, though he had resided in a separate house from his parent(a). The general rule is, that wherever a person ceases to reside under the protection of the certificate act 8 & 9 W. 3. c. 30., the stat. of Anne no longer applies to him.

Wood, contra. This case turns on the construction of the stat. 12 Ann. st. 1. c. 18. s. 2, which enacts, that no person bound as an apprentice or hired as a servant to any person "who shall come into or reside in any parish by "means or licence of a certificate" shall thereby gain a settlement. The question then is, whether *Ralph Stokell*, the son of the certificated person and the master of the pauper, was not residing in *Sowerby* at the time of the hiring and service "by means or licence of the certificate" granted to his father? It has been holden, that a child born after a man comes into the certificated parish is within the certificate; *Sherborne v. Thornford*, Burr. S. C. 182, and that he so continues after his father's death. *R. v. Alfreton*, 7 Term Rep. 471. Also in *R. v. Hampton*, 5 Term Rep. 266, the certificate was determined to extend to a second wife married after the granting of it; and what is

(a) Vide *R. v. Bath Easton*, 8 Term Rep. 446.

immediately in point, that an apprentice bound to such wife after the husband's death could not gain a settlement thereby in the certificated parish; though the second wife were not named in the certificate, as she continued to reside under the certificate. It is clear then from these authorities, that both the mother and the son continued to reside under the certificate after the father's death; and these were not broken in upon by *R. v. Darlington*, 4 Term Rep. 797; for that only decided that the certificate did not include grandchildren. Then the only case which at all bears upon the present, is *Rex v. Heath*, 5 Term Rep. 583; but that went on this plain distinction, that during his father's life-time, who alone was named in the certificate, the son married, and was separated in fact from the father's family, and became the head of a distinct family and house of his own. He therefore ceased to come under the description of the father's family; and might gain a settlement for himself. Whereas here there was no actual separation of the son from the mother's family; and as she certainly continued to reside under the certificate, it must also extend to all those who continued members of her family. The certificated parish could have no notice that he ceased to be part of her family either from the circumstance of his coming of age, or his carrying on business for himself, which he might do before he was of age, or from his hiring the pauper.

LORD ELLENBOROUGH, C. J. The opinion which I have formed does not appear to me to clash with the case of *The King v. Heath*. There, there was every thing which could well be predicated of emancipation: the marriage of the son; his living in a separate house from his father, as the head of a distinct family: and being rated by the parish as such in his own name. Here there is nothing of the kind: while the father was living the son resided under his roof, and after the father's death he continued to reside with his mother, who was the representative of the father, and equally protected by the certificate. This comes then directly within the principle of *The King v. Hampton*; where it was holden that an apprentice to the widow of a certificated man could not gain a settlement in the certificated parish after the husband's death. If this question had come now to be decided for the first time, I should have been prepared to decide it on the plain words of the stat. of Anne, referring to the stat. 8 & 9 W. 3. c. 30, and 9 & 10 W. 3. c. 11., which have been broken in upon by many cases, laying down rules of construction much less plain than the words of the statute itself. The stat. 9 & 10 W. 3. c. 11, speaks of two methods only by which any person coming into a parish with a certificate shall by any act whatsoever be adjudged to have procured a legal settlement there; those are by taking a tenement of the yearly value of 10*l.*, or by executing some annual office within the parish. Then the stat. 12 Ann. st. 1. c. 18. s. 2, enacts, that "if any person shall be an apprentice bound by indenture, or be a hired servant to any person who *came into* (which extends to such as came into the parish with the person certificated) or *shall reside* in any parish by means or licence of such certificate" (which includes such persons as come into the parish afterwards, and reside under the protection of the certificate); "and not having afterwards gained a legal settlement there," (which was in allusion to the methods pointed out by the stat. 9 & 10 W. 3. c. 11.) "such apprentice or servant shall not be adjudged thereby to have a settlement in such place," &c. The object of the Legislature by these acts certainly was to protect the certificated parish from sustaining any new burthen by persons gaining settlements there who were residing there upon the faith of these certificates, except by one or other of the methods pointed out. I am therefore decidedly against extending the construction of the statutes further than it has been carried. Now who can be considered as a person residing by means or licence of a certificate, if the son of a certificated man continuing to live with his father's widow in the certificated parish is not such a person? If, as in the *Hampton* case, the widow of a certificated

man were privileged to continue in the parish under the certificate after his death, as part of his family; so must his son by the same rule, who continued part of the same family. There was no emancipation in this case to distinguish it from the other: but it comes expressly within the principle of the *Hampton* case, and what is more material, it comes directly within the meaning of the statute of Anne.

GROSE, J. A person is within the words of the statute of Anne who is serving another residing in any parish by means or licence of a certificate. Now here *Ralph Stokell*, the son, either lived there as part of father's or his mother's family during all the time: and it is not denied that both the father in his lifetime and the mother after his death were residing in *Sowerby* under the certificate. There was no emancipation of the son, no taking of another house for himself, nor anything of the sort which occurred in *Rez v. Heath*; and there is no pretence for saying that his going out for a few weeks at harvest-time would operate as an emancipation. We ought to be careful not to create more doubts by refining away the meaning of the statute and prior decisions upon the subject.

LAWRENCE, J. declared himself of the same opinion.

LE BLANC, J. We are now called upon to put a construction upon the statute 12 Anne; and as in the only case which turned on that branch of the statute, *The King v. Hampton*, it was holden that the widow after the husband's death was still protected by the certificate as part of his family, and therefore that her apprentice serving her could not thereby gain a settlement in the certificated parish; so neither can the servant to the son continuing part of the same family gain a settlement there.

Both Orders quashed(1).

Lord Rodney and the Honourable John Rodney v. Chambers.

2 East, 288. May 8, 1802.

A covenant by a husband to pay to trustees a certain annual sum by way of separate maintenance for his wife in case of their future separation, with the consent of such trustees or their executors, &c. is valid in law.

IN covenant, the plaintiffs declared, for that whereas by indenture of the 18th August 1798, made between *George Chambers* (the defendant) of the first part, the Honourable *Jane Chambers* his wife of the second part, *George Lord Rodney* and *J. Rodney* of the third part, and *J. Milbanke*, since deceased, of the fourth part. After reciting that Sir *W. Chambers*, Knight, made and duly executed his will, dated the 19th of June 1795, and that he thereby bequeathed to said *Jane Chambers* his son's wife an annuity of 200*l.*, so long as she should continue to live in wedlock with her said husband, or in case of his death continued unmarried; but in failure of either of these conditions her said annuity should cease and be void from the day of such failure; and Sir *W. C.* appointed *T. C.*, *G. A.*, and *R. B.*, executors, &c. and died, &c. and his executors duly proved the will: and further reciting, that *Jane Chambers* the defendant in her right was entitled to a pension of 100*l.* granted by an act of the *Irish* parliament passed in 1780, and payable to her as one of the younger children of the late *George Lord Rodney* during her life: and further reciting, that divers differences had lately arisen between the defendant and *Jane* his wife, and that the defendant, in order to put an end to such differences, and to induce the said *Jane* his wife to continue to live with him, had agreed to treat her with all due kindness and regard, and to enter into the

(1) Vide *The King v. The Inhabitants of Cowhoneyborne*, 10 East, 88.

covenants and agreements therein after contained, subject to such conditions and restrictions as are thereafter mentioned: it was by the said indenture witnessed, that in pursuance of the said agreement, and in consideration of 10*s.* &c. *George Chambers* and *Jane* his wife bargained, sold, and assigned to the plaintiffs, their executors, &c. the said annuity of 200*l.* bequeathed to the said *Jane* by the said recited will of Sir *W. C.*, and also the said pension of 100*l.*, and all arrears and future payments thereof; and all the right, title, interest, trust, &c. legal and equitable, of the defendant and *Jane* his wife therein, upon the trusts, &c. therein mentioned, (*viz.*) as to the said pension of 100*l.* in trust to pay the same unto the said *Jane Chambers* or her appointee in writing, for her sole and separate use, whether she continued to live with her husband or not, and that it might not be subject to his debts, control, &c. And as to the said annuity of 200*l.*, in trust from time to time so long as the defendant and *Jane* his wife should live together to apply the same, or so much thereof as the said plaintiffs and *John Milbanke*, or the survivor or survivors of them, or the executors or administrators of such survivor should in their or his discretion think necessary, in the purchasing of wearing apparel and other necessities for the said *Jane Chambers*. And as to so much of the said annuity of 200*l.* as the said plaintiffs and *John Milbanke*, or the survivors or survivor, or the executors, &c. of such survivor should not deem necessary to be applied for the purposes last mentioned in trust to pay the same to the defendant, his executors, &c. And upon further trust, in case any separation should thereafter take place between the said defendant and *Jane* his wife, with the approbation of the plaintiffs and *John Milbanke*, or the survivors or survivor of them, or of the executors, &c. of such survivor, or, in case of the death of the defendant in the lifetime of the said *Jane Chambers*, then and in either of the said cases, and so often as it should happen, that the plaintiffs and the survivor of them, &c. did and should from time to time pay the whole of the said annuity of 200*l.* as the same should be received by them in such and the same manner for the benefit of the said *Jane Chambers* as therein before was directed touching the said pension of 100*l.* And the defendant did thereby for himself, his heirs, &c. covenant to and with the plaintiffs, their executors, &c. that in case future differences should arise between the defendant and *Jane* his wife, and she the said *Jane* should on that account at any time thereafter find it necessary to live separate and apart from him, he the defendant should permit and suffer her to leave him, and from time to time and at all times thereafter to live, inhabit, and reside separate and apart from him in such place or in such family as she should think proper; and should not prosecute, disturb, or molest the said *Jane*, or any person in whose house or family she should reside, on account of her remaining separate and apart from him the said *G. Chambers*, subject nevertheless to the condition or proviso in that behalf thereafter contained. And moreover, that in case the said annuity of 200*l.* thereby assigned should at any time during the life of the said *Jane Chambers* cease to be payable, he the defendant, his heirs, &c. should from thence pay unto the plaintiffs, their executors, &c. during the natural life of the said *Jane*, one annuity of 200*l.* by equal quarterly payments from the time the said annuity of 200*l.* under the said will of Sir *W. C.* should cease to be payable; upon trust that the plaintiffs, and the survivor of them, and his executors, &c. did and should pay the same to and for such and the same intents and purposes, and in such and the same manner as thereinbefore was declared touching the said annuity of 200*l.* thereby assigned; the first payment of the said annuity of 200*l.* to begin at the end of three calendar months next after the said annuity of 200*l.* under the said will should cease: as by the said indenture, &c. appears. The plaintiffs then averred, that afterwards, to wit, on the 1st *January* 1799, at, &c. the said *John Milbanke* died; and that after his death, to wit, on the 10th *August* 1799, at, &c. a separation did take place between

the defendant and *Jane* his wife, with the approbation of the plaintiffs: and the said *Jane Chambers*, from the time of the said separation to the commencement of this suit, hath lived separate and apart from, and hath failed to live in wedlock with her said husband; by reason whereof the said annuity of 200*l.*, so given by the said will of the said Sir *W. C.*, did cease and become void from the time of such failure of the said *Jane Chambers* to live in wedlock with her said husband. The declaration then stated, that three quarters of the annuity of 200*l.* became due after such separation, which were unpaid; and that the defendant, though requested, had refused to pay the same, &c.

Pleas. 1. That at the time of the said supposed separation between the defendant and his wife, to wit, on 10th *August* 1799, the said *J. Milbanke* was alive; and traversing his death at the time, &c. as stated in the declaration; on which issue was joined. 2. Protesting that the supposed separation, &c. did not take place with the approbation of the said *J. Milbanke*, avers that, *J. M.* on the said 10th of *August* mentioned was alive, &c. To which there was a demurrer, shewing for special cause that the defendant had therein tendered an immaterial issue, and had attempted to put in issue a fact not alleged in the declaration; and for that the said 10th of *August* is not in the declaration materially alleged; but the substance of the allegation there is, that the separation between the defendant and his wife took place after the death of *J. Milbanke*, &c.

Williams, Serjt., in support of the demurrer, (after observing that it was not attempted to support the plea^(a), but that it was meant to be insisted that the declaration was bad, on account of the illegality of the covenant providing for the future separation of husband and wife,) contended that such a covenant was neither illegal nor immoral, but was warranted by analogies in the law and by direct authority. 1. It cannot be objected that a covenant to provide for the future separation of husband and wife is void as militating against the policy of the law, when it must be admitted that such covenants have long been established by repeated decisions in cases where separation has actually taken place. They must both stand or fall together; and all the arguments which can be urged against the one have been urged against the other and over-ruled above a century ago. If it be illegal to provide for the possibility of a future separation, as tending to facilitate such an event, it cannot be less so to abet and support an actual separation, and thereby impede a reunion of the parties. Besides, the principal object of this deed was to make an end of the differences which are recited to have existed between the parties before that time. Where a husband and wife had agreed to live separate, *Lister's case*, 8 Mod. 22, and she was to be allowed a separate maintenance: and the husband pretending, as it is said, a desire to be reconciled to her, which she refused, forcibly took her into his custody; the court so far recognized this species of contract, that they set her at liberty, saying that the agreement should bind them both till both agreed to cohabit together again. This was again recognized in *Mary Mead's case*, 1 Burr. 542, where the court held such an agreement to be a formal renunciation by the husband of his marital right to force his wife to live with him. So in *Seeling v. Crawley*, 2 Vern. 386, an agreement for separation upon certain terms to be performed by the husband and the father of the wife was decreed by the Court of Chancery to be executed, on a bill filed by the father against the husband. The like was done in *Angier v. Angier*, Prec. in Chan. 496, and *Guth v. Guth*, 3 Bro. Chan. Cas. 614, upon bills respectively filed against the husband by the wife for a performance of

(a) Upon this occasion the Court found fault with the paper books sent to them, in omitting to notice in the margin the points intended to be argued, as required by a late rule of court of H. 38 Geo. 3. which they observed was not then a new regulation, but rather a revival of an old rule made in E. 2 Jac. 2. (Vide 2 Tidd's Pract. 669, 670.) They observed, that upon the present occasion their attention had been entirely diverted from the real point intended to be litigated, by looking to the cause of demurrer assigned.

articles of separation. One of the objections in the former case was, that it was in fact to decree a separation and alimony, which was usurping upon the jurisdiction of the ecclesiastical court; but this was denied by the Lord Chancellor, who observed, that the intent of the articles was to save the expence of a sentence in that court, to supersede the necessity of an application there for alimony. It is therefore in furtherance of what the law would compel in case of the ill-treatment of the wife by the husband. Other cases have occurred, which, like the present, provide for future separation. Such was the case of *Nicholls and Danvers v. Danvers*, 2 Vern. 671, where the defendant having before ill treated his wife gave her a note, that if he should again use her ill she should have her share of her mother's estate (which was 3000*l.*) to her own use. And upon this happening, she and her brother filed a bill against her husband for this purpose; and the Lord Keeper decreed the interest of it to her for life for her maintenance, and afterwards to the husband for life, and the principal to the issue, if any; if none, to the survivor of the husband and wife. But he principally relied on the case of *Gauden v. Draper*, 2 Ventr. 217, where the plaintiff declared in covenant on an indenture whereby the defendant covenanted that his wife *Sarah* should live separately from him until they both gave notice by writing, attested by two witnesses, to cohabit again; and that during such separation he would pay to the plaintiff 300*l. per ann.* by quarterly payments for his wife's maintenance. It was then averred, that from the date of the indenture until the bringing the action the defendant's wife lived separately from him, and that no such notice had been given, and that 75*l.* for one quarter was in arrear, &c. The defendant pleaded in bar a subsequent indenture, made between him and his wife of the one part, and the plaintiff of the other; which reciting the first indenture, and that the defendant and his wife did then cohabit, and that it was the true intent of all the parties that as long as they did so agree to cohabit the said annuity should cease; it was therefore covenanted by the plaintiff, that so long as the defendant and his wife should cohabit, the defendant should be saved harmless from the said annuity, and might retain it: and then averred, that ever since the last-mentioned indenture they did cohabit. The plaintiff replied, that they did not cohabit *modo et forma*, &c.; to which the defendant demurred; and contended that the cohabiting again by mutual agreement, alleged in the last indenture and confessed by the demurrer, had dispensed with the circumstances of the notice in writing, &c. required by the first indenture. But the Court gave judgment for the plaintiff; for unless the cohabitation were according to the first indenture, it was no bar; the last deed not having taken away the effect of the former. And that the defendant could only have his remedy on the latter deed. The effect therefore of the first deed was evidently to provide for future separations; for it was admitted by the demurrer that the husband and wife had cohabited together after the first deed; and yet it was suffered to be put in force by the trustee of the wife against the husband for arrears occurring afterwards: the Court thinking the two deeds not inconsistent; though during the actual cohabitation at any time, the defendant would have a counter remedy upon the second indenture.

Onslow, Serjt., contra. None of the cases come up in terms to the present; because in none of them was any provision expressly made in case of future separation; though incidentally that might be the case: and therefore the Court will not be inclined to extend the principle of those determinations an iota further than they are compelled by express authority to do; considering the very dubious ground on which they proceeded; and that in all probability if the question were now to arise for the first time, it would undergo very different consideration. That it is contrary to the policy of the law and to good morals to enter into any contract which has a direct tendency to loosen the band of union between husband and wife, and to facilitate their separation, cannot be denied: and though the same objec-

tion in some degree applies to contracts for separate maintenance, even after an actual separation; yet it holds in a stronger degree before such separation; inasmuch as it is of more evil consequence to facilitate the happening of a mischief than to provide for it after it has happened. Besides, the public evil of such separations is greater or less in proportion to the illegality or immorality of the cause which produces them; of which no previous judgment can be formed, and upon which the ecclesiastical court alone are competent to decide. But these previous arrangements which make no discrimination between the causes of separation are more objectionable on that account, even if it be allowable for the parties themselves after the event to substitute their own judgment by way of contract in lieu of that forum which the law has provided. And not only the judgment of the trustees is so substituted in the place of the ecclesiastical court, but also of their executors and administrators. And further, this deed not only makes provision for one future separation, but for any number of them from time to time. Most of the cases cited were in the Court of Chancery, which on many occasions exercises an equitable jurisdiction in making family arrangements: but no action of law could have been maintained on the agreements which were the foundation of those decrees for want of a legal consideration. The only case at law is that of *Gawden v. Draper*, 2 Vent. 217, which turned more upon technical rules of pleading, whether one covenant could be set up in bar to another: and though the plaintiff recovered, the Court gave no opinion on the legality of the prior deed, nor was it brought before them in argument. *Lister's case*, 8 Mod. 22, and *Mary Mead's case*, 1 Burr. 542, were merely interferences of the court on *habeas corpus* to protect the complainants from brutal violence, and no determinations on the effect of civil contracts for separate maintenance. But further, this deed is also in contravention of the intention of Sir William Chambers; and renders nugatory the condition which he annexed to the bequest to his son's wife by his will, and which she has enjoyed under it.

Williams, Serjt., in reply observed, that the latter argument though it were well founded, (which he denied,) could not avoid the covenant, it not being in contravention of any public law. That the period at which a contract was made could not determine its legality or illegality, if the subject matter of it were the same, and the general law continued the same. That some of the cases mentioned by him before were stronger than the present; because there the feme covert herself was left to be the sole judge of the propriety of her living apart from her husband; whereas here trustees were interposed who might be reasonably presumed to be more impartial judges. At any rate, it could not make it more objectionable that the agreement to live apart and the right to separate maintenance was to have the approbation of third persons. That as the case of *Gawden v. Draper* was an action of covenant for the separate maintenance, it was impossible that the attention of the Court should not have been called to the legality of the contract declared on.

Lord ELLENBOROUGH, C. J. The question which has been agitated appears to have been laid at rest for a long period by repeated decisions and the uniform practice of the courts. If it were now a new question, whether any contract could by law be made which tended to facilitate the separation of husband and wife, I should have thought that it would have fallen in better with the general policy of the law to have prohibited any such contract: but they are now become inveterate in the law; and we cannot reject the present on that ground, without saying that all contracts which have the same tendency are vicious; which would extend, for aught I can see, to provisions for pin-money, or any other separate provision for the wife which tends to render her independent of the support and protection of her husband. This case does not differ materially from those which have been alluded to in the argument. The only difference is, that the covenant is not in conformity with the will of

Sir *William Chambers*, the wife's father, which meant to give her the annuity of 200*l.* only during the period of her living with her husband. But this is not in contravention of any positive law, but only of the will of an individual. What in effect does this covenant do more than to recognize the rights of the parties in certain situations, in which they are at liberty without such a covenant at any time to place themselves. The legality of contracts of separation was fully recognized in all the cases cited, and many more which might be mentioned; and without overturning all those, we could not say that this covenant is illegal. As to its tending to induce future separation, if it do so more than in the other cases, which I am not prepared to say, at least it had the merit in the first instance of establishing a reunion between the parties, and certainly there can be nothing vicious in such a provision. The case of *Nicholls v. Danvers*, 2 Vern. 671, strongly supports the doctrine contended for by the plaintiff's counsel. That was a note given conditionally by the husband to the wife to let her have the 3000*l.*, part of her mother's estate, for her separate use, in case he used her ill. That was a prospective provision, which was carried into effect by the Court of Chancery upon the event afterwards happening; and though the money was derived from the wife's mother, yet the husband would otherwise have been entitled to it by law in right of his wife. The case of *Gawden v. Draper* does not, I think, go to the full length contended for. That was a provision for a separate maintenance until such time as the parties, by a certain instrument, should declare their assent to live together again: and the question raised by the plea was, Whether an actual cohabitation afterwards by consent, without its being so signified, and a covenant to retain the provision, before stipulated to be paid by the husband during such cohabitation, were a good plea in bar of the first covenant? But at least it shews that the first covenant was good in law; for otherwise the Court could never have given judgment for the plaintiff on the covenant declared on, be the merits of the plea what they might. And it cannot be supposed that the point could have passed without notice, though it do not appear in the report to have been discussed. But it has been so long established, and by so many decisions, that the courts will give effect to contracts for separate maintenance, that it cannot now be called in question; and those cases, I think, govern the present.

GROSE, J. However we may lament the practice which is established, it is impossible for us at this day to say, that agreements for separate maintenance are not considered valid both in law and equity. The case of *Gawden v. Draper* was a decision in a court of law, which establishes the general proposition for which it was cited; for unless the agreement there declared on were valid, the plaintiff could not have had judgment. And it is too much for us to say, that the court were inattentive, and did not know what they were deciding. Such agreements having been long acted upon, both in courts of law and equity, we cannot now disturb those decisions.

LAWRENCE, J. Not having had my attention previously called to the point intended to be discussed on these pleadings, I am not so well prepared as I should otherwise have been: but upon the discussion which has now taken place I think the plaintiff is entitled to recover. I do not, however, think that the case of *Gawden v. Draper* goes the whole length for which it was cited: it only shews that in the case of an actual separation a covenant for securing separate maintenance is good; up to that extent only is it an authority in point; but there was no provision there made for any future separation, in case the parties had once come together again after the making of the covenant. And the only question which arose on the second deed was, Whether in effect it amounted to a revocation of the former covenant, inasmuch as it did not shew that the parties had agreed to cohabit again in the manner and form there stipulated for. The Court thought that the two deeds were not inconsistent. But the case of *Nichols v. Danvers* is expressly in point for this

purpose; for that was an agreement, not in consequence of any actual separation, but in contemplation of such, in case the husband afterwards used his wife ill. Now in this case it appears, that before the making of the deed the husband and wife had separated, and the great object of the deed was to bring them together again; but in so doing, and probably as one inducement to their reconciliation, it provided that in case of any future cause of separation, instead of being obliged to have recourse to the ecclesiastical court for alimony, a domestic forum should be erected to consider, Whether she should live separately from her husband, and have a separate maintenance. That was some check upon her, and was intended to operate as such. Upon the principle, then, of former decisions, this conviction does not appear to be invalid.

LE BLANC, J. The situation of the wife was this: she had a pension of 100*l. per ann.* from the *Irish* Parliament, and an annuity of 200*l.* under the will of Sir *William Chambers*, which latter was only payable to her as long as she lived with her husband, or, in case of his death, remained a widow. These were conveyed to the trustee in trust, as to the 100*l. per ann.* for her separate use at all events; and as to the 200*l. per annum*, in trust to pay so much of it as they should deem necessary to her separate use while she lived with her husband: but in case of any future separation, then, as the annuity of 200*l.* would be no longer payable to her under Sir *W. Chambers's* will, the trustees were to pay her the 200*l.* if they consented to such separation. It does not appear, therefore, that her situation was to be benefited by her separating from her husband. But it is objected, that any agreement of this sort is contrary to the policy of the law in respect to the marriage-state. But if so, the objection would have weighed as much in every case where the contract tended to facilitate separation between husband and wife. If the principle of such contracts be illegal, the court cannot weigh the degree of facility; but every contract which at all facilitates such a separation must be void. Yet it has been holden that deeds of separation are not illegal; though the argument would apply as well to those cases. I cannot see how it can be more illegal to contract for separate maintenance in case of future than of present separation. Upon the same ground it might equally be objected, that every provision by will or deed making a permanent provision for a wife apart from the control of her husband, with whom she was then living was illegal; because by rendering her independent of him, it would facilitate their separation. Then it is urged, that this deed was in contravention of the will of Sir *Wm. Chambers*; but that is not so; for it is no more in contravention of his will than if her own father, finding that his daughter was sufficiently provided for while she lived with her husband, had also provided for her in case of her separation. That is a very frequent provision; which has been recognized to be legal again and again. The case of *Nicholls v. Dancers* almost goes the whole length of the present. The note was there given by the husband to let his wife have the 3000*l.* in case he should again use her ill: that must have meant, in case she should be obliged to live separately from him, by way of separate maintenance; because, to oblige himself to provide for her while she continued to live with him would have been useless: and that agreement was enforced by the Court of Chancery. Judgment for the Plaintiffs.

The King v. The Inhabitants of Eccleston.

2 East, 298. May 19, 1802.

Where the pauper agreed with a weaver to serve him for a year and a half, and the master was to teach him to weave, and the pauper was to have half his earnings and find himself in every thing; under which contract the pauper served his master for above a year; held that he thereby gained a settlement as by hiring and service; it being the apparent intention of the parties to create the relation of master and servant, and not of master and apprentice.

TWO justices by an order removed *Adam Davenport*, his wife and family

by name, from the township of *Little Bolton* to the township of *Eccleston*, both in the county palatine of *Lancaster*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case :

The respondents proved a settlement gained by the pauper in *Eccleston* ; after which the pauper, when about 15 years of age, went into the township of *Tonge* with *Haulgh*, and made a verbal agreement with one *Samuel Clough* there, who was a weaver of counterpanes, to serve him a year and a half. *Clough* was to teach him to weave counterpanes ; and the pauper was to have one half of what he earned ; and the pauper was to find himself in every thing. Nothing else passed between them on making the agreement. The pauper worked under this agreement with *Clough* for the year and a half ; except for a fortnight, during which he remained absent ; but *Clough*, however, brought him back into his service, and obliged him to stay a fortnight over the year and a half in order to make up the time he had been absent from his service. During the time of this service he slept constantly at his mother's house at *Little Bolton*.

Holroyd in support of the orders, admitted that if the case of *Rex v. Little Bolton*, Cald. 367, were law, the present could not be distinguished from it in principle ; but contended that that case had been since over-ruled. There it was considered, against Lord *Mansfield's* first opinion, that an agreement of this sort, and service under it, might enure as a hiring and service in the relation of master and servant, though the latter were to be taught a trade, because he was not retained *eo nomine* as an apprentice. But this was holden otherwise in *Rex v. Highnam*, Ibid. 491, where the true nature of such contracts was considered to be that of an apprenticeship, and therefore that they could not, without defrauding the revenue, be made to enure as a hiring. And in *Rex v. Laindon*, 8 Term Rep. 379, Lord *Kenyon* delivered an express opinion against the authority of the first mentioned case, which opinion was afterwards followed up in *R. v. Rainham(a)*. The only difference between this case and *R. v. Laindon* was, that there the pauper gave his master a premium upon his entering into his service ; but in *R. v. Rainham* that was holden not to be essential to the constitution of an apprenticeship ; for which nothing more is required than that the one should contract to teach and the other to learn a trade. No technical words are necessary to constitute an apprenticeship. This is different from that class of cases, such as *Rex v. Martham(b)*, where the party contracts to serve his master generally in other respects as well as in the particular business which he was to be taught. For though it is first stated generally, that the pauper in this case was to serve his master for a year and a half, yet the nature of the service is afterwards explained, and is shewn to have been confined to the learning to weave. And if the intention of the contracting parties be to govern the decision of these cases, then the Sessions, by disaffirming the settlement in *Little Bolton*, have in effect found that the parties meant to contract the relation of master and apprentice, though they have failed in their object for want of a proper instrument duly stamped.

Toppling and *Scarlett*, contra, relied on the case of *Rex v. Little Bolton*, Cald. 367, as in point ; which, they said, was not intended to be over-ruled by the court in the cases of *R. v. Laindon*, 8 Term Rep. 379, *R. v. Rainham(c)* ; both which turned on the intention of the contracting parties to create an apprenticeship. This was expressly adverted to by Lord *Kenyon*, in *R. v. Laindon*, as the ground of his opinion ; though he also threw out some objections to the case of *R. v. Little Bolton*, so far as it seemed to establish the necessity of an apprentice being retained *eo nomine* ; and *Le Blanc, J.*, whose opinion proceeded on the same ground, expressly distinguished the case then in judgment from that of *R. v. Little Bolton*. In the other case of *R. v.*

(a) Ante, 1 vol. 531.

(b) Ante, 1 vol. 239.

(c) Ante, 1 vol. 531.

Rainham, it was immaterial to consider, whether the contract were to serve as an apprentice or as a hired servant; since in either case the pauper, having served above a year, gained a settlement. If indeed the parties intend to contract the relation of master and apprentice, and do it defectively, as in those cases; it cannot enure as a hiring and service; nor if it be done fraudulently, in order to avoid the stamp duty, as in *R. v. Highnam*, Cald. 491; which was the real ground of that determination, and sufficiently distinguishes it from *R. v. Little-Bolton*. The last mentioned case is supported by many others; as *R. v. Hitcham*, Burr. S. C. 489, *R. v. Buckland Denham*, Ibid. 694, *R. v. Birmingham*, Dougl. 333, *R. v. Alton*, E. 24 G. 3; 2 Const. 382; all which shew that contracts to work at a particular trade only may constitute the relation of master and servant between the parties; though, as in *R. v. Hitcham*, and *R. v. Martham*,^(a) the servant were to be taught by his master. And in *R. v. Coltishall*, 5 Term Rep. 193, where the contract was to serve the master for the purpose of being taught a trade, but the servant also agreed to do any other work; Ld. *Kenyon*, after saying that the latter circumstance was decisive, observed as to the teaching the trade, that it was deemed no more than equivalent to part of the servant's wages.

LORD ELLENBOROUGH, C. J. I give a reluctant assent to the case of *The King v. Little Bolton*: but as the case now before us is in terms the same as was there decided, I think it is better to abide by that determination than to introduce uncertainty into this branch of the law; it being often of more importance to have the rule settled than to determine what it shall be. I am not, however, convinced by the reasoning of that case; and if the point were new I should think otherwise. I should consider, as Lord *Kenyon* said in *R. v. Laindon*, that if the relation of master and apprentice be created by the contract of the parties, though they do not use the very words master and apprentice, yet if they use words tantamount, it is sufficient. The word "apprentice," he observed, was taken from *apprendre*, to learn; and what was that but an apprenticeship, where the purpose of the contract was for one man to teach and the other to learn a trade? Then what was this intended to be? I should have said upon general reasoning, that where the contract was that the master should teach the other a trade, and the latter was to do nothing ulterior the employment in that trade, it was a contract *apprendre* in the true sense of the word: and being defective in this case for want of proper legal formalities, it could not enure as a contract of hiring as a servant. However, as Lord *Kenyon* did not think proper to over-rule the case of *The King v. Little Bolton* in terms; though he disapproved of what was there said; and as it was not overturned in the case of *Rex v. Highnam*, or *Rex v. Rainham*, for the reason I at first gave, I think it better to concur in that decision, however unwilling I should have been to have done so in the first instance.

GROSE, J. This case so exactly resembles that of *Rex v. Little Bolton* that I cannot distinguish them.

LAWRENCE, J. It is of infinite consequence in these cases that what has been once expressly determined should be adhered to. The case referred to is directly in point: and not having been over-ruled, it ought to govern the present. *The King v. Laindon* and *The King v. Rainham* are both very distinguishable from the present.

LE BLANC, J. The case of *The King v. Little Bolton* is a direct authority to the present point; and that case has never been over-ruled in terms; neither do I think that it has been over-ruled in principle.

The Orders quashed.

The King v. The Inhabitants of Corsham.

2 East, 808. May 19, 1802.

A servant hired for a year departed from his master some short time before the end of the year, on ill usage, but received his whole year's wages and something over: held, that he thereby gained no settlement, he having refused to serve out the year when required by his master.

TWO justices by an order removed *Mary* the wife of *Charles Isaac*, and their five children by name, from the parish of *Kington Saint Michael* in the county of *Wilts* to the parish of *Corsham* in the said county. The sessions on appeal confirmed the order, subject to the opinion of this Court, on a case stating:

That the pauper's husband *Charles Isaac* was born at *Box* in the county of *Wilts*, and about 14 years since was hired for a year, and served the same in the parish of *Colerne*. That he was afterwards hired by *Mr. Dalmer* of *Corsham* at four guineas *per annum*, with whom he continued to serve till within a fortnight or three weeks of the expiration of the year; when, upon a dispute between him and his master, he, in consequence of his master's kicking him, would not stay, but went to his father's house in *Kington Saint Michael*. In the course of the following week, and before the end of the year, he returned with his father to *Mr. Dalmer's* house, and received the whole of his wages, and half a crown over for himself; his master asked him to stay, but he refused, and went back to his father's house.

Jekyll and *Williams*, in support of the order of Sessions, said, that according to the case of *The King v. St. Peter* of *Mincroft* in *Norwich*, 8 Term Rep. 477, it was the province of the Sessions to draw the conclusion, whether the contract of hiring were dissolved, or whether the master only dispensed with the service: and by confirming the order of removal to *Corsham* they had virtually found that there was a dispensation only of the service. This too was the proper legal conclusion; for it has been long settled that a master shall not by injuriously turning away his servant defeat his settlement; and here the master compelled the servant to depart by his maltreatment in the first instance: and, what is material, the master paid him his wages up to the end of the year, and something over as a compensation. Then if the remainder of the service were once dispensed with, the master could not compel the completion of it against the servant's will, though the contract still subsisted in law.

Casberd, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. The cases of *Rex v. Grantham*, 3 Term Rep. 754, and *Rex v. Upwell*, 7 Term Rep. 433, have decided the present question. In both of them there was a payment by the master of the whole year's wages, and a departure from the service before the end of the year against the will of the master; and in both the court held that no settlement was gained. There is nothing material to distinguish this case from those; and therefore it is better to abide by them. Whether there were a dissolution of the contract or a dispensation of the service is indeed a question of fact, but of fact mixed with law; and the Sessions, having stated all the circumstances, have sent us the case that we may draw the proper legal conclusion.

GROSE, J. This is not like the cases where the master has turned away the servant to prevent his gaining a settlement; for the master wished him to stay, and the pauper refused: then the payment of the whole year's wages by the latter was merely to prevent an action, and argues no consent on his part to dispense with the service.

The other Judges concurred.

Orders quashed.

Davison v. Frost.

2 East, 305. May 19, 1802.

An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested on bailable process is irregular, and he cannot be holden to special bail thereon.

A RULE was obtained, calling on the plaintiff to shew cause why common bail should not be entered instead of special bail, &c.: which was grounded on an objection to the writ of *latitat*, whereon the defendant had been arrested and holden to bail for 177*l.* for the sum for that which he was arrested was not inserted in the *ac etiam* part of it.

Marryat shewed cause, and contended, that even if it were necessary before the stat. 12 Geo. 1. c. 29. to state the sum in the *ac etiam*, it was no longer so since that statute. Before the stat. 13 Car. 2. st. 2. c. 2, a defendant was liable to be arrested and holden to bail on a common bail of *Middlesex* or *latitat* for any sum, though not expressed in the writ: to prevent which, that statute provided that no person arrested upon any bailable process wherein the true cause of action was not particularly expressed should be compelled to give security for his appearance in any sum exceeding 40*l.* In consequence of this, and in order to preserve the jurisdiction of civil causes to *B. R.* to the same extent as before, the *ac etiam* clause was invented, in which the true cause of action is expressed, in addition to the general complaint of trespass, which gives the court jurisdiction. Still, however, the evil continued; for a plaintiff might insert what sum he pleased in the *ac etiam*; and therefore the stat. 12 Geo. 1. c. 29, enacts, that no person shall be holden to bail upon process out of the superior courts for less than 10*l.* and that an affidavit of the debt shall be made, and that the sum sworn to therein shall be indorsed upon the back of the process; and that the sheriff shall not take bail for more. The insertion, therefore, of the sum in the *ac etiam* is wholly nugatory; because neither the sheriff nor the party is bound by it, but only by the sum sworn to and indorsed on the back of the writ. He referred to *Turing v. Jones*, 5 Term Rep. 402.

Lawes, in support of the rule, relied on the uniform practice, which had been needlessly departed from in this instance, in omitting to state the sum in the *ac etiam*. Much of the practice of the court depends on positive rules and known precedents, rather than on general reasoning; and it would be very inconvenient to break in upon it, though its utility may not be apparent; by the same mode of argument, the whole of the *ac etiam* clause might be omitted in the writ, since the use of it was superseded by the affidavit to hold to bail and the indorsement on the writ. It ought, however, to appear on the face of the writ itself whether or not it be bailable process: the indorsement is only to ascertain the amount, and has reference to the contents of the writ.

The Court took time to inquire into the practice; and the next day Lord *Ellenborough*, C. J. said, that the writ was irregular in the frame of it, as not being in conformity to an old rule of court of 1729(a), which gave the

(a) *Regula Generalis*, H. 2. G. 2. 1729.—It is ordered, that where any defendant shall be arrested by virtue of any process issuing out of this court, in which the cause of action shall be specially specified and expressed; or a copy of such process shall be delivered to any defendant, according to the form of the statute in such case made and provided; and the plaintiff thereupon shall declare; the defendant in such case shall not have liberty of impugning, without leave of the Court in that behalf first to be granted; but shall plead thereunto within the time allowed by the course of the Court to defendants sued by original writ; and for want thereof judgment may be entered against such defendants by default. (*)

Notice fixed in the K. B. O.

Ac Etiam.

(*) This rule is now enlarged to process in common form: Trin. 5 & 6 G. 2 M. 10 G. 2. and stat. 5 G. 2. c. 27. by which it is enacted, that no special writ nor process specially expressing the cause of action shall issue, unless the cause of action amount to 10*l.*

form of the *ac etiam* clause ; in which is stated the amount of the debt, and by which the practice had ever since been regulated.

GROSE, J. added, that the settled forms of proceedings ought to be adhered to ; and all novel attempts to vary from them, without the authority of the court, ought to be discouraged.

Rule absolute.

The King v. Bingham, Clerk.

2 East, 308. May 20, 1802.

Information in nature of *quo warranto* lies for the office of bailiff of a court leet, being a prescriptive officer, having power to summon and select the jury.

A RULE was obtained, calling on the defendant to shew cause why an information in nature of *quo warranto* should not be exhibited against him to shew by what authority he claimed to be bailiff of the manor and borough of Gosport in the county of Southampton. This rule was obtained on affidavits stating, that the Bishop of Winchester was lord of the manor and borough, and that from time immemorial a court leet and court baron had been holden every year about October by the bishop or his steward, within and for the same ; and that a jury and homage assembled at such courts have immemorially from time to time exercised the privilege of choosing the bailiff of the said manor and borough, and also the constables, overseers of the ferry, ale-conners, coal-meters, and cryer, by the custom of the manor, &c. to act for the then ensuing year ; and that the steward or his deputy has always attended the court and sworn in the said bailiff and other persons so chosen to their respective offices. That entries of such proceedings were invariably made in the records from 1683 to 1800 ; and that prior to 1683 no usage to the contrary could be traced. It was also deposed to be part of the duty of the bailiff to summon the jury and homage who where required to attend the courts, which he had immemorially performed : he selecting from amongst the inhabitants of the manor and borough sixteen proper persons for that purpose. It was then stated, that at a court leet holden in October 1800, the jury and homage so summoned by the then bailiff and sworn by the steward, R. Forbes was by them nominated to be bailiff for the then ensuing year, which nomination was signified to the steward, who refused to swear in Forbes, declaring to them that the bishop had chosen Mr. Bingham (the defendant) : and that the latter had since then acted as bailiff.

In answer to which it was sworn by the defendant and others, that the bishop by writing under his hand and seal appointed the defendant his bailiff to collect, receive, and recover from the tenants of the manor for the bishop's use all rents, heriots, reliefs, perquisites, and profits payable to the lord, &c. ; by virtue of which the defendant had since executed the said office of bailiff, the duties of which were to collect the lord's rents and revenues, to summon the jury and homage to attend the said courts, to attend there himself, and to execute the precepts of the lord and his steward. The affidavits then stated matter in contradiction of the right of the jury and homage to elect the bailiff ; and endeavoured to explain the practice which had prevailed, by shewing, that from the year 1667 the book of entries of the manor courts contain-

All clerks and attornies that intend to proceed according to the above rule, are to take notice, that in suing out such writ they do not insert in the *ac etiam* the whole declaration at length, but only describe the cause of action shortly, according to the specimen hereunder set forth, varying the same as the nature of the action shall require.

Of a plea of trespass ; and also of a bill of the said Q. against the aforesaid D. for fifty pounds for divers goods, wares, and merchandises sold and delivered to the said D. by the aforesaid Q. according to the custom, &c.

ed no presentments of bailiffs by the jury and homage until 1719, when the custom first originated in consequence of the then bishop having leased all the tolls, dues, and profits of the manor to twelve inhabitants of Gosport, most of whom had been in the habit of serving on the jury, and one of which number had usually been presented to serve this office. That the lease granted for 21 years had been renewed from time to time till very lately; and during its continuance the lords of the manor had not intermeddled with the appointment of the bailiff.

Gibbs and Sturges shewed cause against the rule. The bailiff is no more than the servant of the lord, and it is not disclosed that he has any other public function to perform than that of summoning the jury, which may be done by any other whom the lord may direct to act in that respect: it is not therefore such an office for exercising which the court will grant this information. Neither can it be conceived that the tenants of the manor from whom the bailiff is to collect the lord's rents and dues should be appointed by themselves, or any other than the lord himself. Properly, it is the business of the lord or his steward to summon the jury; but though they may have always done this by their servant the bailiff, that will not alter the nature of his employment, or convert that which is a private into a public office. The court must be satisfied before they grant the rule that the defendant has been guilty of an usurpation on the franchise of the Crown. This is a mere ministerial officer, and not a judicial officer like the steward. In *Rex v. Boyles*, 2 Stra. 836. 2 Ld. Raym. 1559. S. C., an information was granted against the defendant to shew by what authority he claimed to be bailiff of a ville; but that went on the ground that it was an office of great trust and pre-eminence in the town, affecting the government of it and the administration of public justice. In *Rex v. Mein*, 3 Term Rep. 593, it was said by Lord Kenyon, that the office must be of magnitude sufficient for the court to notice it by way of information in nature of *quo warranto*; there the defendant was portreeve and returning officer. A churchwarden has much more important public duties to perform than this defendant can be pretended to have; and yet the Court in *R. v. Shepard*, 4 Term Rep. 391, refused to grant even a rule to shew cause. They also argued upon the merits of the case.

Burrough in support of the rule. The bailiff is stated to be a prescriptive officer, and therefore a member of the court leet, whom the lord cannot drop at his pleasure, but must exercise the entire franchise granted to him in the manner prescribed by the crown: and part of the franchise so granted is to be exercised by this officer. The importance of his function is not the question. The steward is in many respects the servant of the lord; yet such an information lies without doubt against him (*a*). Then how is that distinguishable on principle from the case of a bailiff? Both claim by the appointment of the Crown; which is the true criterion on which these cases turn. It appears that the bailiff is always sworn in: that shews that he is a public officer. But besides that, he not only summons the jury, but selects such of the tenants as he pleases for this purpose; which is a very important function in the administration of justice. He is as much a branch of the court as the steward. There is no other convenient method of trying the right but this; for there are no fees annexed to the office (*b*): but even if there were, that is no answer to an information for usurping any franchise of the Crown; otherwise it might be given in almost every case.

Lord ELLENBOROUGH, C. J. There appears to be sufficient doubt raised upon the fact by the affidavits to induce us to put the matter into a course of

(*a*) *Rex v. Hulston*, 1 Stra. 621. Vide *Rex v. Cann*, Andr. 14. and *Rex v. Bridge*, 1 Blackst. 46.

(*b*) This was said in answer to an observation thrown out in the course of the argument by Lord Ellenborough; that the question might as well be tried in an action for money had and received.

inquiry before a jury, provided this be such an office for which it is fit to grant an information in nature of *quo warranto*. I do not doubt that the office, as appendant to a court leet, is such for which the information will lie. My doubt has been whether, according to what was thrown out by Lord *Kenyon* in *Rex v. Mein*, it is of sufficient consequence and magnitude to warrant our interposition in this form. But an observation urged at the bar has had weight with me, which is, that the bailiff is an officer having a discretionary power as to the persons whom he should select for the jury, which is a material function to exercise. Then having no fees annexed to his office, there is no other convenient civil mode of trying the right to it.

The other Judges concurring;

Rule absolute.

Wilson and Others v. Hodges and Another.

2 East, 812. May 20, 1802.

Where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death.

IN debt on recognizance of bail, the breach assigned was, that *Michell* the principal had not paid the damages, nor rendered himself, &c. according to the form and effect of the said recognizance. *Plea*; that after the judgment, &c. and before the suing out the writs of *scire facias*, and before the return of the writ of *capias ad satisfaciendum* against *Michell* upon the judgment, he *Michell* died: concluding with a verification. *Replication*; that after the giving the judgment, and before the suing out of the said writs of *scire facias*, or either of them, the plaintiffs sued out a writ of *capias ad satisfaciendum* against *Michell*, returnable, &c. to which the sheriff returned *non est inventus*; and the plaintiffs further say, that *Michell*, at the said return of the said writ of *capias ad satisfaciendum*, and afterwards, was living, &c. which they are ready to verify. *Rejoinder*; that *Michell* was not at the said return of the said writ of *ca. sa.* living, as the plaintiffs had replied; concluding to the country: on which issue was joined.

At the trial before *Le Blanc, J.* at the sittings at *Guildhall*, the only question was, Whether the issue lay on the defendants to prove the death of *Michell*, or on the plaintiffs to prove that he was alive at the time mentioned? The learned Judge thought that the proof of the issue lay on the defendants, who averred the death of the party, and they not being prepared with any proof of the fact, the verdict passed for the plaintiffs on that ground. To set aside which *Erskine* obtained a rule *nisi* in the last term, on the ground of a misdirection, as well as on affidavit. *Gibbs*, was now to have shewn cause. But

Lord ELLENBOROUGH, C. J. said, there was no doubt but that the direction of the learned Judge was proper in point of law. And he referred to the case of *Throgmorton v. Walton*, 2 Roll. Rep. 461, where it was decided; that where the issue is upon the life or death of a person once shewn to be living, the proof of the fact lies on the party who asserts the death; for that the presumption is, that the party continues alive until the contrary be shewn.

However, as the defendants swore that they had been misled by an opinion taken, which stated that the issue on these pleadings lay on the plaintiffs; and as circumstances were deposed to, which went to prove the death of the principal as stated;

The Court let the defendants in to a new trial on payment of costs.

Rule absolute(1).

(1) [See *Miller v. Beates*, 3 S. & R. 490. *Innes v. Campbell*, 1 R. 373. *Burr v. Sim*, 4 Wh. 180. *Bradley v. Bradley*, do. 173. In the case of an absent person, of whom no

Parkinson v. Lee.

2 East, 314. May 20, 1802.

Upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable; though a fair merchantable price were given; and therefore if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part, (but arising from the fraud of the grower from whom he purchased,) such seller is not answerable, though the goods turned out to be unmerchantable.

IN *assumpsit*, the first count of the declaration stated, that in consideration that the plaintiff would buy of the defendant five pockets of hops at a certain price, the defendant promised to deliver to him the same, *and that the hops should all be of like goodness and quality, with a certain sample of the hops contained in each of the five pockets, and then produced and shewn by the defendant to the plaintiff.* It then stated, that the plaintiff, confiding in the defendant's promise, afterwards bought the hops, &c. and that afterwards the defendant delivered to the plaintiff five pockets of hops as and for hops of like goodness and quality with the respective samples so as aforesaid produced and shewn to the plaintiff; yet that the defendant did not regard his said promise, but thereby deceived and defrauded the plaintiff in this respect, that the hops contained in each of the five pockets so delivered to the plaintiff at the time of the delivery thereof to him were not hops of like goodness and quality with the respective samples, but were much inferior, &c. and were bad, damaged, and unsaleable hops; whereby the plaintiff lost the benefit of selling the same, &c. and gaining large profits, &c. The second count stated the contract to be, that in consideration that the plaintiff would buy of the defendant five other pockets of hops at a certain price, the defendant promised the plaintiff to deliver to him the same, *and that the same should be good, sound, and merchantable hops*; and then alleged the purchase and delivery, as before, of so many pockets of hops as and for good, sound, and merchantable hops; yet that the defendant did not regard his promise, but thereby deceived and defrauded the plaintiff in this respect, that the said hops, at the time of the delivery thereof to the plaintiff, were not good, sound, and merchantable hops, but on the contrary were bad, damaged, and unmerchantable: whereby, &c. There were other common money counts, concluding to the plaintiff's damage of 200*l.* Plea, *non-assumpsit*.

At the trial before *Le Blanc, J.* at the sittings after last *Michaelmas* term at *Guildhall*, it appeared that the plaintiff and defendant were both dealers in hops. In *January* 1800, the five pockets were purchased by the plaintiff of the defendant, warranted to answer the samples by which they were sold. They were not, however, removed till the 8th of *July* from the defendant's to the plaintiff's warehouse. The price paid was 16*l.* 5*s.* per cwt. which was the fair market price at the time for good merchantable hops. Previous to and at the time of the sale the samples answered fairly to the commodity in bulk; and no defect was perceptible at that time to the buyer: but owing to the grower of the hops having fraudulently watered them after they were dried, before they were originally purchased by the defendant, (a fraud to which the defendant was not privy, and of which he was wholly ignorant at the time of the sale,) it was discovered a few days

tidings are received, the presumption of the continuance of life ceases at the end of seven years. This is the rule in *England* and in *Pennsylvania*. The presumption begins to run from the time that the absentee was last known to be alive; and he is presumed to have lived throughout the whole period of seven years, commencing as aforesaid. See also, *Doe v. Jenson*, 6 East, 80. *Doe v. Nepeau*, 5 B. & Ad. 86. *Newman v. Jenkins*, 10 Pick. 515. *Woods v. Woods*, 2 Bay. 476. *King v. Paddock*, 18 Johns. 141.—W.]

after the removal of them to the plaintiff's warehouse that one of the pockets was so much heated as to be in an unsaleable condition ; which pocket was thereupon immediately returned to the defendant, who received it back, and allowed for it in settling the account for the other hops, which was done on the 18th of *October* following. In the intermediate time, however, it was found that the other four pockets were in the same unsaleable condition from the same cause ; but, owing to the plaintiff having first attempted to maintain an action against *Clarke*, the grower, under the mistaken supposition that the defendant was only acting as his agent (which action was afterwards discontinued on finding that the defendant was not agent but vendee) ; the present action was not commenced till upwards of a twelvemonth after the transaction, and after a refusal by the defendant to allow for the rest of the pockets. It appeared further, that the object of watering hops after they are dried is to give them weight ; but the effect of it is, after some months, to cause them to heat and corrupt in the pockets or bags into which they are packed, till at last they become quite unfit for sale. This effect is not produced on the sample, which is usually taken from the middle of the bag, by means of its exposure to the air. It is impossible even for the best judges of the commodity always to detect this fraudulent practice for some time afterwards by any inspection of the sample or of the commodity itself in bulk, till it is disclosed by the gradual process of heating. However, by the latter end of *July* 1800, the effects of it were apparent in all the pockets ; and at time of the trial, although the samples still continued as at first, the commodity in bulk was become perfectly unmerchantable. Upon this evidence the learned Judge left it to the jury to find for the defendant on the first count, if they were satisfied that the commodity agreed at the time with the sample by which it was sold, and there was no fraud on his part notwithstanding any latent defect in the commodity in bulk unknown to the parties, by which it became afterwards deteriorated. But he instructed them that if they were satisfied that the commodity, at the time of the sale, had such a latent defect as no prudence or skill of the buyer could, on inspection, detect or guard against, the plaintiff was entitled to recover on the implied warranty in the second count, although the seller had no knowledge of such latent defect ; it being the understanding of both parties to such a contract, though not expressed in the special warranty, that the one was to sell and the other to purchase a merchantable commodity. He also left it to the jury to consider whether the plaintiff, by delaying so long to proceed against the defendant, had thereby waived his remedy against him ; which the jury answered in the negative ; and found for the defendant on the first count, as the commodity answered in fact to the sample at the time of the sale, without fraud, and he had then no knowledge of the latent defect of the commodity. And they gave a verdict for the plaintiff on the second count, considering that there was an implied warranty in the seller that the commodity was in a merchantable state at the time of the sale.

A rule *nisi* was obtained in the last term for setting aside the verdict and having a new trial, on the ground of a misdirection of the judge in point of law, and of a defect of evidence to support the finding of the jury on the second count.

Lambe now shewed cause, and contended that notwithstanding the proof of an express warranty by the defendant, the seller, that the commodity should answer the sample, the performance of which was found by the jury for the defendant, there was also an implied warranty in every contract of this nature, where a fair price was to be given, that the commodity should be in a merchantable condition at the time of the sale ; otherwise the buyer might receive a different thing from that which he stipulated for, and which it was the understanding of both parties that he should have. In *Stuart v. Wilkins*, Dougl. 20, it was contended by the defendant's counsel, and not denied, that there were two sorts of warranty, 1. expressed ; 2. implied. That was the

case of the warranty of a horse; where the plaintiff declared in *assumpsit*; and held well, because such a form was adapted to let in both proofs if necessary. A person, by stipulating expressly for a particular quality or the like in a commodity cannot be understood as thereby relinquishing all claim to the general soundness and marketable state of such commodity; if so, the greatest inconvenience would ensue in trade, and no man would venture to make a specific contract for fear of omitting any thing which would otherwise be implied in common good faith and the usage of trade, which is bottomed in confidence. In a policy of insurance there is no express stipulation that the ship shall be sea-worthy: but that is holden to be implied; and therefore the want of knowledge in the assured that the ship has a latent defect which renders her not sea-worthy is no answer to the breach of such implied warranty. If one agree to purchase iron at the market price which the seller warrants to be *Russian*, that does not exclude the implied undertaking that it shall be marketable iron. So if one stipulated to purchase wine of such a vintage for a fair price, it would be no answer to an action for delivering sour wine, that it was of that vintage. So a custom in a country that tenants shall have the way-going crop after the expiration of their term is good though they held by deed, without such stipulation^(a). It is true, that a sound price does not in itself necessarily import a warranty of soundness; but it is a circumstance from whence the jury may collect what was the real contract between the parties. It may be different where a defect is apparent on the face of a commodity; there it may fairly be presumed that the buyer exercised his own judgment upon it; at least, it was his own fault if he did not: but this was a latent defect, which no prudence or sagacity of the buyer could detect; against such he gives credit to the seller. Whatever natural defects or infirmities are incidental to the subject matter, the buyer must take the risk of; such as those with which horses are afflicted; such as the perishable nature of all sorts of goods; to such defects the maxim *caveat emptor* applies; but the latent defect of the hops in this cause arose from the fraud of man, which the buyer at a fair price has no reason to contemplate. Here the substance of the issue was, Whether or not the buyer contracted for the purchase of the commodity with all latent defects: which the verdict of the jury has negatived, and it was a question for their consideration.

Erskine and Espinasse, in support of the rule, relied on the maxim *caveat emptor*; there being neither warranty nor fraud on the part of the defendant. This was a latent defect originating in the fraud of the grower, but wholly unknown to the seller at the time; for which therefore nothing but an express stipulation can render him liable to the buyer: all that he engaged for was, that the commodity was answerable to the sample by which it was sold; and that is found by the jury. Where a sale is by sample, provided the sample be truly taken, it is the same as if the buyer had examined the commodity in bulk; therefore, both parties must be taken to have the same opportunity of knowledge. No implied warranty can be raised from a fair price in the sale of hops, any more than in the sale of a horse, where it is admitted that it does not exist. Neither is there any ground for distinguishing between the latent defects or infirmities of the one and the other; both may originate from the act of man operating by natural means. Every person entering into a contract in the course of trade is presumed to have a competent skill to enable him to judge of the commodity he bargains for. He knows the defects to which it is liable as well from fraud as from natural causes, and he speculates accordingly. In the instance put, of purchasing wine, if the sample as well as the pipe contained in it the principle of future acidity, though not then perceptible to the palate of the individual purchaser, and the only warranty was that the

(a) Vide *Wigglesworth v. Dallison*, Dougl. 201.

pipe answered the sample, it is clear that the seller would not be bound to stand to the loss. Where else can the line be drawn? and what degree of future deterioration from pre-existing causes will be sufficient to set aside the contract? Implied warranties may arise out of known usages of trade, because both parties are presumed to have engaged on such known terms; but here no usage was proved for the seller to stand to the loss; on the contrary, witnesses engaged in the hop trade were called by the defendant to shew that in the understanding of the trade the buyer was to stand to the risk of latent defects: but the learned Judge refused the evidence, as amounting to no more than opinion. If then an implied warranty be to be raised in this, it must in all other cases of sale; and then the maxim of *caveat emptor* will become an exception instead of a general rule.

GROSE, J. This is a case of considerable consequence; because the rule laid down in this case must extend to all other cases of sales, not governed by particular usages of trade in this respect. The question is, Whether in the case of a sale made under the present circumstances, there be any implied undertaking in law, that the commodity be merchantable? No express undertaking is proved to that effect: and there is no fraud imputed to the defendant. The mode of dealing is that the plaintiff buys hops from the defendant, whom he knows is not the grower, by samples taken from the pockets in which the commodity is close packed. He has opportunity of judging by the samples such as he finds them at the time. If he doubt the goodness, or do not choose to incur any risk of a latent defect, he may refuse to purchase without a warranty. If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties. But if there be no such warranty, and the seller sell the thing such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact. It is the fault of the buyer that he did not insist on a warranty; and if we were to say that there was, notwithstanding, an implied warranty arising from the conditions of the sale, we should again be opening the controversy, which existed before in the case in *Douglas*. Before that time it was a current opinion that a sound price given for a horse was tantamount to a warranty of soundness; but when that came to be sifted, it was found to be so loose and unsatisfactory a ground of decision, that Lord *Mansfield* rejected it, and said there must either be an express warranty of soundness, or fraud in the seller, in order to maintain the action. Here neither has been shewn; the defendant merely sold what he had before bought upon the same mode of examination. Therefore I think there ought to be a new trial.

LAWRENCE, J. I agree with my brother *Grose*, that there is no ground for the plaintiff to recover. It is not pretended that the defendant has been guilty of any fraud or imposition in the sale. And I must suppose that each party was equally well acquainted with the commodity bargained for. There was no representation made by the defendant to the plaintiff as to the goodness of the hops, to induce him to make the purchase. But here was a commodity offered to sale, which might or might not have a latent defect: this was well known in the trade; and the plaintiff might, if he pleased, have provided against the risk, by requiring a special warranty. Instead of which, a sample was fairly taken from the bulk, and he exercised his own judgment upon it; and knowing, as he must have known, as a dealer in the commodity, that it was subject to the latent defect which afterwards appeared, he bought it at his own risk. I know of no authority which makes the seller liable for a latent defect where there is no fraud, and no representation was made by him on the subject to induce the buyer to take the thing. In 1 Roll. Abr. 90 P. it is said, that if a merchant sell cloth to another, *knowing* it to be badly full-ed, an action on the case in nature of deceit lies against him, because it is a warranty in law. But there is no authority stated to shew that the same rule

holds if the commodity sold have a latent defect, not known to the seller. So again, the case is there put, if a man sell me a horse with a secret malady, without warranting it to be sound, he is not liable; that is, if there be no fraud. The instances are familiar in the case of horses. It is known that they have secret maladies, which cannot be discovered by the usual trials and inspection of the horse; therefore the seller requires a warranty of soundness, in order to guard against such latent defects. Then how is this case different from the sale of a horse, where it is admitted that the buyer must stand to all such latent defects. To pursue the analogy still further: on the sale of real estates, the seller submits his title to the inspection of the purchaser, who exercises his own or such other judgment as he confides in on the goodness of the title: but though it should turn out to be defective, the purchaser has no remedy, unless he take a special covenant or warranty: provided there be no fraud practised on him to induce him to purchase. If there be, as is said, many frauds practised in the trade of hops, that may require more caution on the part of the buyers to protect themselves by taking warranties; but that will not affect the present contract which was no more than that the bulk should agree with the sample; which it was proved to do at the time of the sale: and as the seller undertook for nothing more, he cannot be answerable in this case.

LE BLANC, J. The inclination of my mind at the trial was, that the jury should find for the plaintiff: because the drawing of fresh samples, or the inspection of the commodity itself in bulk, would have afforded no information to the buyer, as to the latent defect which afterwards appeared: and therefore it occurred to me that as there was no want of prudence on the part of the buyer, and the defect was of such a nature that no inspection of the thing could have led to a discovery of it, the law would on that account raise an implied undertaking on the part of the seller; that it was a merchantable commodity, such as it appeared then to be. But upon further consideration, as the same rule which applies to other cases must govern this; and as in the only instances in which the same question has come directly in judgment, namely, in sales of horses, it has been considered that without a warranty of soundness by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects; and as I see no ground for distinguishing between this case and those; and no instance has been produced in which a contrary rule has been laid down in respect of any other commodity; I therefore concur with my brothers, that there should be a new trial.

LORD ELLENBOROUGH, C. J. then observed, that as he had been concerned in the cause, he had forbore taking any part in the deliberation with the rest of the court; but having now heard their opinions, he must declare his entire concurrence with them in the judgment they had delivered (1)(2).

Rule absolute.

(1) The rule is now perfectly settled in *England* and in the state of *New-York*, that the seller is not liable for defects of any kind in the thing sold, unless there is an express warranty, or fraud in the seller. 1 Com. Dig. tit. Action upon the case for a deceit. (A. 11). 2 Bla. Comm. 451. *Stuart v. Wilkins*, Doug. 20. 1 Vin. Abr. 560. (P. 6.) pl. 1. 1 Roll. Abr. 90. (P.) pl. 3. *Chandler v. Lopus*, Cro. Jac. 4. *Springwell v. Allen*, Aleyn 91. S. C. 2 East 448, in notis. *Paget v. Wilkinson*, cited *ibid.* *Dunlop v. Waugh*, Peake's Ca. 123. *Oldfield v. Round*, 5 Ves. Jun. 508. *Seixas v. Woods*, 2 Caines 48. *Snell & al. v. Moses & al.* 1 Johns. Rep. 96. *Perry v. Aaron*, 1 Johns. Rep. 129. *De-freeze v. Trumper*, 1 Johns. Rep. 274. *Dorlan v. Sammis*, 2 Johns. Rep. 179, in notis. *Holden v. Daken*, 4 Johns. Rep. 421. *Davis v. Meeker*, 5 Johns. Rep. 354. The same doctrine is said to be established in *Pennsylvania*, *Cooper's Justin*. 609, in notis.

And even in case of an express warranty, if the defects are obvious, the warranty is not binding. *Bayly v. Merrell*, Cro. Jac. 386. *Dyer v. Hargrave*, 10 Ves. Jun. 507, Bul. Ni. Pri. 81.

If the vendor has knowledge of latent defects, and does not disclose them, it will amount to fraud and render him liable. *Mellish v. Motteaux*, Peake's Ca. 115. If the defect be patent, so that the purchaser in the exercise of ordinary diligence might have discovered it, he

Castling v. Aubert.

2 East, 325. May 21, 1802.

The plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant: held, that this was not a promise for the debt or default of another within the statute of frauds; and that the plaintiff might recover against the defendant as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received.

THIS was an action on the case to recover damages for a breach of an agreement, which was tried at the sittings after last *Trinity* term; when a verdict was found for the plaintiff for 25*l.* subject to the opinion of the Court on the following case.

The plaintiff was employed by one *E. P. Grayson* as his general agent; and, as an insurance broker, had effected for his use certain policies of assurance mentioned in the declaration, of the value of 3000*l.* That the plaintiff was under acceptances for *Grayson*, for bills drawn by *Grayson* for his own accommodation, and that the plaintiff had a lien on the said policies to indemnify himself against his said acceptances. That a loss having happened on the policies of insurance which the underwriters had agreed to pay, but which *Grayson* could not receive without having the policies to produce, the plaintiff was applied to, to give them up for that purpose to the defendant, into whose hands *Grayson* had at that time transferred the management of his insurance concerns. That some of the plaintiff's said acceptances for the use of *Grayson* being then outstanding and unpaid, and particularly the bill for 181*l.* 1*s.* mentioned in the declaration then in the hands of one *Cator*, upon which writs had been sued out (though not then executed) against *Grayson* as the drawer and the plaintiff as acceptor; the plaintiff refused to deliver up the policies of assurance, they being the only securities he had against his said acceptances, without an indemnity: and that thereupon a meeting was held between plaintiff and defendant and *Grayson*, at which it was verbally agreed between the parties, that the defendant should pay into the hands of a banker 712*l.*

is without remedy, whether the vendor had knowledge of the defect or not; for *vigilantibus, non dormientibus, jura subveniunt*. *Fitzherb. N. B. 94, C.* But in a case where the defect, though patent, was industriously concealed by the vendor, it was held that equity would not assist him. *Shirly v. Stratton*, 1 Bio. Ch. Ca. 440, Sug. Vend. 200

In *Connecticut, South Carolina and North Carolina*, the doctrine of the civil law, that a sale for a sound price implies a warranty of soundness in the thing sold, has been adopted. *Bailey v. Nickols*, 2 Roet 407. *Timrod v. Shoolbred*, 1 Bay 319. *Whitefield v. McLeod*, 2 Bay 380. *Galbraith v. Wythe*, 1 Hayw. 464.

By the civil law, and the law of *England*, a warranty of the title of the vendor is implied in the sale of a personal chattel, 2 Bla. Com. 451. This doctrine has been recognized by the supreme court of *New-York*. *Defreeze v. Trumper*, 1 Johns. Rep. 274.*

(2) [*A sale of goods by sample is tantamount to an affirmation, or express warranty, that the goods sold are the same, generically and specifically, as the parcel exhibited as the sample. But where a vendor of goods shows a sample, he may not be presumed to affirm that there is not an unknown and invisible defect, owing to natural causes, or to previous management by some former dealer; and, as to these particulars, he may not be liable without an express warranty. *Bradford v. Manly*, 13 Mass. 139.

From a critical examination of all the cases, it may be safely ruled, that a sample or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty, that the goods are what they are described or represented to be by the vendor.

Per *Rogers, J.* (Sup. Ct. of *Pennsylvania*.) in *Borrekins v. Bevan*, 3 R. 37. A sale by sample, is, per se, a warranty that the bulk shall correspond in quality with the sample. *Beebe v. Robert*, 12 Wend. 418. *Andrews v. Kneeland*, 6 Cow. 354. *Oneida Manufacturing Co. v. Lawrence*, 4 do. 440. *Waring v. Mason*, 18 Wend. 425.—W.]

13s. 6d., to answer in part certain other acceptances of the plaintiff's exclusive of the bill for 1817. 1s. : and that the plaintiff should provide 2417. 14s. 6d. towards paying one of his acceptances for 3502. ; and that the defendant should pay the bill of 1817. 1s. and the costs of the action which had been brought thereon against *Grayson*, amounting together to 2022. ; and that thereupon the said policies should be delivered up to the defendant. That in pursuance of this agreement the defendant paid into the banker's hands 7127. 13s. 6d., and the plaintiff delivered up the policies to the defendant. That the defendant received from the underwriters the amount of other subscription(a) on the policies so delivered up to him by the plaintiff. That the defendant was afterwards called upon by the attorney of *Cator* to pay the said 2022. for the debt and costs on the bill in *Cator's* hands, but refused to do so, nor had he paid it at the time this action was commenced ; and that in consequence of such refusal the plaintiff was arrested at the suit of *Cator* as acceptor of the said bill of exchange, and sustained damages thereby to the amount found by the jury. The question for the opinion of the Court was, Whether the promise of the defendant to pay the said 2022. due from *Grayson* for the said debt and costs, on having the policies of assurance delivered to him, was void under the statute of frauds ; or whether he were liable by reason of the plaintiff's parting with the possession of those policies upon which the plaintiff had a lien, and which were so deposited with the defendant ?

Espinasse, for the plaintiff, contended, that the statute of frauds (29 Car. 2. c. 3. s. 4.) was no bar to the plaintiff's recovery in the case, as it only applied to cases where there was no consideration for the promise ; where there was neither benefit to the defendant, nor damage to the plaintiff, but only a mere parol undertaking by the one to the other to answer for the debt or miscarriage of a third person. Whereas here the plaintiff having made himself responsible by his acceptances for *Grayson* to a large amount, and having security in his hands to that extent, was induced to part with such security to the defendant in consideration of his undertaking to provide for those acceptances. There was, therefore, a loss to the plaintiff, and a beneficial consideration to the defendant. The construction of the statute was much canvassed in *Pillans v. Van Mierop*, 3 Burr, 1663, 1672, 1673. *Wilmot*, J. said, "If it be a departure from any right, it will be sufficient to graft a verbal promise upon." Now here was a departure from the plaintiff's lien on the policies. *Yates*, J. in the same case said, "Any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make it binding, although no actual benefit accrue to the party undertaking." Here the damage to the plaintiff is the loss of his security, the value of which has been received by the defendant, if that were necessary to sustain the plaintiff's right of action. And according to *Buller* J., *Cooke v. Oxley*, 3 Term Rep. 654 ; it is sufficient to sustain a promise that there be either a damage to the plaintiff or an advantage to the defendant. The statute of frauds has always been confined in its application to collateral undertakings for a third person, and where at the time there was a subsisting debt or duty due by such third person to the party to whom the collateral undertaking was made. The undertaking must be for the debt of another already contracted. *Read v. Nash*, 1 Wils. 305. But there was no debt due at the time from *Grayson* to *Castling* ; the latter had only given the former his acceptances, but they were still outstanding and unpaid. The case of *Williams v. Leper*, 3 Burr. 1886, is directly in point ; where a broker, being employed to sell the goods of an insolvent for the benefit of creditors, in order to prevent the landlord of the insolvent from distraining, gave him a parol promise to pay the rent in arrear if he would desist : and this was holden not to be within the statute of frauds, inasmuch as the landlord had a lien on the goods, a legal pledge, the

(a) To an amount, as was stated at the bar, much beyond the sum in dispute.

parting with which was a good consideration for the promise. So in *Meredith v. Short*, Salk. 26, the delivering up to the defendant a note given to the plaintiff by a third person was ruled to be a good consideration for a promise to pay the amount: as in *Love's case*, Ibid. 28, a promise by a third person to the sheriff to pay the debt, if he would restore the goods of the debtor taken in execution, was holden good.

Gibbs, contra, contended that the promise was void by the statute of frauds; which did not merely avoid parol promises by a third person to pay the debt of another, but also to answer for his default or miscarriage. This then, if not a promise to pay an existing debt, was at least a promise by the defendant to answer for the default or miscarriage of *Grayson* in case he did not indemnify the plaintiff for his acceptances when they became due and were paid by him on *Grayson's* account. The plaintiff was bound to pay his acceptances when due: when paid, the amount would constitute a debt from *Grayson* to him: and this is a promise by the defendant to pay that which *Grayson* would be bound to pay; that is, provided *Grayson* himself did not discharge the obligation. It is no answer to say, that if there be a direct consideration passing between the plaintiff and the defendant, though with reference to the debt or default of a third person, it takes the case out of the statute: for then the statute was unnecessary and nugatory: for even before the statute there must have been some consideration passing between the parties to support the promise, otherwise it was *nudum pactum*: the statute, therefore, must have been intended to attach on cases where there was such a consideration: but the construction contended for operates as a repeal of it. The only case which presses against the defendant is that of *Williams v. Leper*, 3 Burr. 1896, which however is distinguishable from the present: for there if the landlord had actually distrained the goods and sold them, it would have been a satisfaction and extinguishment of the debt as between him and the tenant. While the landlord held a competent distress, he had as it were a special property in the goods, and could have no other remedy for his original demands. The promise then by the broker was a new debt, and not a collateral undertaking for the debt or default of another. At the time when the new consideration attached between those parties, the old debt of the tenant was extinguished; whereas here, after the promise by the defendant, the plaintiff still had his remedy against *Grayson*. [Lawrence, J. You argue as if the Landlord there had made an actual distress; but he had only given notice of his intention so to do. Lord Ellenborough. The mere agreement with the broker there not to distrain would not estop the landlord from afterwards distraining upon the tenant.] Then if that case were not decided on the ground that the landlord had relinquished his principal remedy against the tenant, it cannot be supported at all, being in direct contravention of the positive words of the statute. *Grayson's* debt is still due, and he is still answerable for it to the plaintiff: and the defendant can only be liable upon his undertaking, because it is the debt of *Grayson*. In the case relied on, *Aston, J.* considered that the goods were the debtor, and that the broker was not bound to pay the landlord more than they sold for; and on that ground alone he agreed with the rest of the Court. He also referred to *Chater v. Beckett*, 7 Term Rep. 201, to shew that where the old debt remains, no new or additional obligation will take the case out of the statute in respect of the original demand.

LORD ELLENBOROUGH, C. J. at the close of the argument observing, that there was a count for money had and received, said, that the plaintiff was entitled to recover upon that count, even upon the ground suggested by Mr. Justice *Aston* in the case of *Williams v. Leper*; for the defendant had received money to a much larger amount from the under-writers upon the policies. His Lordship afterwards continued:

I am clearly of opinion, that this is neither an undertaking for the debt, default, or miscarriage of another within the statute. It could not be for the

debt, but rather for the *credit* of another; for when the promise was made no debt was incurred from *Grayson* to the plaintiff; therefore, if at all within the statute, it must be for the default or miscarriage of another. But see what the case is: the plaintiff, who was *Grayson's* broker, had policies of insurance in his hands belonging to his principal, which were securities on which he had a lien for the balance of his account; and on the faith of these he agreed to accept bills for the accommodation of his principal. One of these bills became due, and actions were brought against the plaintiff as acceptor, and against *Grayson* as drawer: and it was desirable that the policies should be given up by the plaintiff to the defendant, in order to enable the money for the losses incurred to be received from the under-writers; the defendant undertaking, upon condition the policies were made over to him, to settle the acceptances due, and to lodge money in a banker's hands for the satisfaction of the remainder as they became due. The defendant then procured from the plaintiff the securities upon the faith of this engagement; in entering into which he had not the discharge of *Grayson* principally in his contemplation, but the discharge of himself. That was his moving consideration, though the discharge of *Grayson* would eventually follow. It is rather, therefore, a purchase of the securities which the plaintiff held in his hands. This is quite beside the mischief provided against by the statute; which was that persons should not by their own unvouched undertaking without writing charge themselves for the debt, default, or miscarriage of another. In the case of a bill of exchange for which several persons are liable, if it be agreed to be taken up and paid by one, eventually others may be discharged; and the same objection might be made there: but the moving consideration is the discharge of the party himself, and not of the rest, though that also ensues. Upon the whole, therefore, I agree with the decision in *Williams v. Leper* to the full extent of it: I agree with those of the Judges who thought the case not within the statute of frauds at all: and I also agree with the ground on which Mr. Justice *Aston* proceeded, that the evidence sustains the count for money had and received.

GROSE, J. I agree with the case referred to on both grounds, and think it would be improper to over-rule it.

LAWRENCE, J. This is to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay, if the plaintiff would furnish him with the means of doing so.

LE BLANC, J. This is a case where one man having a fund in his hands which was adequate to the discharge of certain incumbrances; another party undertook that if that fund were delivered up to him, he would take it with the incumbrances: this, therefore, has no relation to the statute of frauds(1).

Postea to the Plaintiff.

(1) Vide *Houlditch v. Milne*, 3 Esp. 86.

Lee v. Clarke, in Error, from C. B.

2 East. 333. May 21, 1802.

In an action on a penal statute the declaration must allege the fact to be done *contra formam statuti* or *statutorum*, as the case may be: stating that by *force of the statute*, an action accrued, &c. is not sufficient, where the penalty is given by one statute, and the right of action to the informer is given by another. *Semble*, where the record was entitled generally of Hil. 41 G. 3, and the fact was laid under a *viz.* on 21st of January 1801, whereas the return of the *capias* must have been at latest on 20th January, and so the suit appeared to be commenced before the cause of action, contrary to the averment in the declaration: such repugnancy is no ground of error. *Semble*, if a statute give an action within six months after the fact committed, (by which must be understood *lunar* months,) and the declaration aver such fact within six *calendar* months before, it is no error; as it will be presumed after verdict that the fact was proved within due time, notwithstanding such irrelevant allegation. *Semble*, that a declaration for a penalty on killing game in an action brought for the whole penalty on the stat. 2 G. 3. c. 19. s. 5, and prior statutes need not allege the fact to have been committed within two terms before the action commenced, according to the stat. 26 G. 2. c. 2, the stat. 2 G. 3. having allowed six months.

IN debt for a penalty on the game laws, the declaration stated, that *Daniel Lee*, within the space of six *calendar* months next before the commencement of this suit, to wit, on the 21st of January 1801, at. &c.; unlawfully used a certain engine called a snare, to kill and destroy the game of this kingdom, he the said *Daniel*, not being then and there qualified by the laws of this realm, nor having any lawful authority so to do; whereby, and by *force of the statute in that case made and provided*, an action hath accrued to *John Clarke*, to demand and have of and from the said *Daniel* five pounds. Plea, *nil debet*. After verdict and judgment for the plaintiff below in C. B. a writ of error was brought into this court, and the following errors assigned:—1. That the supposed offence is not alleged to have been committed against the form of any statute or statutes, not being an offence at common law. 2. That the supposed cause of action is alleged to have accrued to the plaintiff below, by force of the statute in that case made and provided; whereas the same accrued, if at all, by force of several and different statutes, made in different sessions of parliament, and not by any one statute. 3. That the plaintiff below commenced this suit against the defendant before the cause of action mentioned accrued. 4. That the cause of action is therein stated to have accrued within six *calendar* months next before the commencement of the suit; whereas by law an action upon such cause of action ought to be brought within six *lunar* months next after, &c. 5. It is not averred in the declaration, that the plaintiff below commenced his suit before the end of the second term after the supposed offence committed. Nor, 6. That he was the first person who sued the defendant for the said penalty.

Dampier for the plaintiff in error. 1. No offence is stated at common law, nor averred to be done against any statute: It is only said that the statute gives the action. Now the statute which gives the action is not the same which constitutes the offence. The penalty is given on summary conviction by the statutes 5 Ann, c. 14. and 9 Ann, c. 25. Then the stat. 8 Geo. 1 c. 19, gives an action to a common informer to recover half the penalty. And lastly, the stat. 2 Geo. 3. c. 19. s. 5, gives the whole penalty to the informer which is now sought to be recovered. Therefore, the present action is founded in part upon all the statutes. A statute may for a thing actionable at common law give an action to another than the party who could have sued at common law; as in the case of the assignee of a bail bond, and in the case of a replevin bond: but here the offence, which is not actionable at common law, is not averred to be so by statute. It ought to have been alleged that the thing done for which the penalty was given was against the form of the statute.

Formerly it was holden necessary to recite a statute where it created a new offence; Com. Dig. action on stat. G.; though now it is deemed sufficient for the declaration to shew a case within the statute: but still it must conclude *contra formam statuti*, 1 Vent. 103; otherwise the question could never have arisen in many cases, whether the conclusion should have been *contra formam statuti* or *statutorum*; for in either case it would have been surplusage. A penal action requires nearly the same strictness as an indictment(a). 2. The two statutes of Ann give the penalty in this case, and two other statutes give the action as now framed, viz. the stat 8 Geo. 1. c. 19, gives the action to the informer for half the penalty, and the stat. 2 Geo. 3. c. 19. s. 5, assuming that the action is given by the prior statute, enables the informer to sue for the whole penalty: but the provisions are not incorporated, as they are different with respect to costs: therefore, the penalty and the form of action being given by different statutes, the conclusion ought to have been against the form of the statutes, and not of any single statute: according to *Dingley v. Moore*, Cro. Eliz. 750, and *Broughton v. Moore*, Cro. Jac. 142, and *Talbot's case* there cited. 3. The suit appears to have commenced before the cause of action accrued. The record is generally of Hil. 41 Geo. 3, and the day laid is the 21st January 1801, whereas the return of the *capias* must have been at latest on the first return of the term, namely, the 20th January, the day before the cause of action is alleged. This action being commenced in C. B. the reasoning in *Pugh v. Robinson*, 1 Term Rep. 116, does not apply; for the cause of action must in this case precede the return of the writ. 4. The offence is alleged to have been committed within six calendar months before the commencement of the suit; whereas the stat. 2 Geo. 3. c. 19. s. 5, mentioning *months*, generally, must be taken to mean *lunar months*: and therefore, consistent with this averment, which alone the plaintiff was bound to prove at *nisi prius*, he may have sued too late. And the averment cannot be rejected as surplusage; because the action being founded on a statute, the plaintiff must aver every matter requisite to entitle him to the action. Com. Dig. action on stat. A. 3. *College of Physicians v. Bush*, 4 Mod. 47. [Lord *Ellenborough*. Notwithstanding the allegation, that the offence was committed within six calendar months, &c. yet if it were not committed within the time prescribed by the statute before the commencement of the suit, the plaintiff must have been nonsuited. *Lawrence, J.* The time having lapsed would have been evidence for the defendant on the plea of *nil debet*. The argument goes the length of assuming that if no time whatever had been alleged, it would have been sufficient for the plaintiff at *nisi prius* to have proved the offence committed at any time before the action commenced; which cannot be pretended.] It might perhaps have been requisite, if no time had been alleged to have proved the offence committed within six lunar months before; but there being a direct averment of another period, it would have been a sufficient answer to the objection, if the proof had referred to a period beyond the six lunar months, but within the six calendar months, to have said that the plaintiff was only bound to prove what was expressly alleged; and that the objection, if any, was open upon the record. 5. It ought also to have been averred, that the action was commenced before the end of the second term after the offence committed, to which period it is limited by the stat. 26 Geo. 2. c. 2.; and though the stat. 2 Geo. 3. c. 19, says within six months, yet that would not in all cases extend the time given by the former statute: so that the latter only operates as a repeal *pro tanto*; and both statutes are still in force, and must be taken to have limited the action to be commenced within six months, provided it do not extend beyond two terms. The words in the last statute are negative words, and not words of extension. The 6th error is not material to be insisted on.

(a) Vide 2 Hawk. H. C. c. 25. s. 116, 117.

Wood, contra. 1. In an action on a penal statute, it is not necessary to aver that it is *contra formam statuti*; it is sufficient, if so much be stated as brings the case within some public statute. As was said in *Caundell v. John*, Salk. 606, that "where a statute introduces a new law, by giving an action where there was none before, or by giving a new action in an old case, the plaintiff need not conclude *contra formam statuti*: but if a statute give the same action, with a difference of some circumstances, as double damages, &c. the plaintiff must either conclude, *contra formam statuti*, or make his case so particularly within the statute, that it may appear to be so." In another report, Holt's Rep. 634, of the same case, Lord Holt is made to say, "If no action lies at the common law, and you may have an action by a general statute: then if you bring yourself within the description of such statute, you need not conclude *contra formam statuti*: so it was agreed in the year 1666, when Roll and Newdigate sat here." The cases cited *contra* are indictments or informations, which differ from the present. But if it be necessary to shew, that the action is framed on a statute, the conclusion here, "whereby and by force of the statute in that case made, an action hath accrued," &c. is sufficient for that purpose. 2. The action given to this plaintiff to sue is only by one statute; and therefore the conclusion in the singular number is proper. The penalty, indeed, was created by the stat. 5 Ann.; but the plaintiff sues only upon the stat. 2. Geo. 3. c. 19. s. 5. [*Le Blanc, J.* Would you have been satisfied to have added that statute after the averment in the count?] 3. There is a positive allegation that the fact was committed before the commencement of the suit: therefore, at most there is only a repugnancy of date, which is no error, but may be rejected as surplusage. *Adams v. Goose*, Cro. Jac. 96. 4. This error assigned is repugnant to the last; for as that stated that the suit was commenced before the cause of action accrued, this is that it was not commenced soon enough after the cause of action accrued; for that it is only alleged within six calendar months, whereas it should be brought within six lunar months. But the answer already given by the court is sufficient: the allegation itself was unnecessary, and may be rejected: and after verdict the court will presume that the fact was proved within due time. 5. It was not necessary to allege the action commenced within two terms, as well as six months, which is the period allowed by the last statute: but at any rate, the answer last given will equally apply to this objection. 6. If this plaintiff were not the first who sued for the penalty, that should have been pleaded in bar.

LORD ELLENBOROUGH, C. J. To some of the errors assigned an answer has already been given by the court: such as those with respect to the allegation of the time within which the action was commenced, being stated to be within six calendar instead of lunar months, and not stated to be within two terms. The allegations were not material; and we cannot now presume that the fact was not proved to have happened within the time prescribed by law for the commencement of the suit. It also strikes me, that there is no weight in the third error assigned. A repugnancy of date on the record is no error: the court will suppose that the cause of action existed, as it is averred, before the action was commenced. But I cannot so well dispose of the first error, that the offence for which the penalty is given is not alleged to be against the form of the statute; it being clear that this was no offence at common law, and only made so by the statute. Such an averment has always been considered necessary; otherwise the cases alluded to, which turned on the distinction between such averments in the singular or plural number, according as the offence arose out of one or more statutes, could never have arisen; for the answer would have been, that either was unnecessary. The only authority which seems to bear the other way is that referred to in Salkeld: but that was not a penal action. It does not distinctly appear but that the subject matter might have been a ground for an action at common law. But at most, it is an anomalous case, against the current of authorities. Also, as to the second error,

it might admit of considerable question whether it should not have been laid against the form of the statutes, where the right of action is given by more than one statute. What was said by *Warburton, J.* in *Owen*, 125, is an express authority in point to this purpose: "if a statute doth prohibit a thing, and another statute give a penalty; there upon an information upon the penalty, both statutes ought to be recited, and to conclude *contra formam statutorum*: but where the statute is only revived, it is otherwise." However, I do not proceed on this objection. I rest on the first, that in an action for a statute penalty by a common informer, as well as in proceedings by indictment or information, it has been invariably holden that the fact must be alleged to be done against the form of the statute. Some or all of the statutes referred to are essential to the maintaining of this action; and I do not see such circumstances stated as bring the case within any of them, without alleging it to be against the form of the statute.

GROSE, J. I have always understood that it was necessary to allege the fact to be against the form of the statute in the case of penal actions as well as indictments.

LAWRENCE, J. As to the first error assigned, that the count does not conclude against the form of the statute, I have always understood that to be necessary in these cases. In the case of indictments, to which this bears a close analogy, there is no question but it is so(a). The reason of which is, that every offence for which a party is indicted is supposed to be prosecuted as an offence at common law; unless the prosecutor by reference to a statute shews that he means to proceed upon it: and without such express reference, if it be no offence at common law, the court will not look to see if it be an offence by statute. This rule is laid down in *Doctrini Placitandi*, 332. (a book which has always been admitted to be of great authority in pleading, and was often quoted by Lord C. J. *Willes*;) "that if an action be brought 'on a statute, the plaintiff ought to rehearse the special matter, and say that 'the action is brought *contra formam statuti*.'" For which is cited the year book 9 Ed. 4. 26. But it is contended, that the conclusion here, "whereby 'and by force of the statute an action hath accrued,' &c. will supply the want of the other allegation. If it had said *statutes* in the plural number, perhaps that might have done: but it certainly is not sufficient with reference only to the stat. 2 Geo. 3. c. 19.; because that alone would not support the action. As to the other objection, upon the repugnancy of the declaration being entitled generally, &c. that might, I think, be gotten rid of as surplusage. It is no error.

LE BLANC, J. I do not see how the first objection can be gotten over. The practice has always been to have such an averment; and a contrary determination in this case might let in a laxity of pleading not only in civil actions, but also in criminal proceedings.

Judgment reversed.

The next day, Lord *Ellenborough* said, that the Court had looked more particularly into the case of *Coundell or Kendall v. John* which is reported in *Salk.* 505. *Holt Rep.* 632—5. and *Fortes.* 125.; and upon comparing them, there did not appear to be that incongruity between that case and other authorities, which they had at first apprehended. In *Holt's Rep.* 635. the Chief Justice on finally giving the judgment of the Court said, "I do agree 'that you need not in an action on the statute conclude *contra formam stat.*:' but you must not say, *de placito transgressionis super casum*;' yet you 'must say, *de placito transgressionis et contemptus contra formam stat.*:' and 'bring yourself within the description of the statute.'" And in *Fortescue's Rep.* Lord C. J. *Holt* is made to say; "You need not recite the statute itself 'if it be a public law, if you bring yourself within the law: and if you do

"not conclude *contra formam statuti*, you must shew it at least by concluding "de placito transgressionis et contemptus." It appears, therefore, to have been the ultimate opinion of the Court that in all cases where the action is founded on a statute, it is necessary in some manner to shew that the offence on which you proceed is an offence against the statute(1).

The King v. The Inhabitants of the West Riding of Yorkshire.

2 East, 342. May 22, 1802.

The county or Riding is liable to the repair of a bridge built by trustees under a turnpike act, there being no special provision for exonerating them from the common law liability, or transferring it to others; though the trustees were enabled to raise tolls for the support of the roads. If a bridge be of public utility, and used by the public, the public must repair it, though built by an individual: *aliter* if built by him for his own benefit, and so continued, without public utility, though used by the public. A bridge built in a public way without public utility is indictable as a nuisance; and so it is if built colourably, in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county.

AN indictment against the defendants for the non-repair of a public bridge (which was removed into this court by *certiorari*) charged, That a certain common public bridge called *Pace Gate Bridge*, otherwise *Keshbeck Bridge*, situate upon a certain rivulet called *Keshbeck*, at the parishes of *Skipton* and *Fewston* in the West Riding of the county of *York*, in the King's highway there leading from the town of *Skipton*, &c. in, through, and over the several townships of *Bearnsley*, &c. to the town of *Knaresbro'* in the same riding, used for all his majesty's liege subjects on foot, and on horseback, and with their carriages, &c. on the 22d of *November*, &c. was, and yet is, very ruinous for want of repairs, &c. against the form of the statutes, &c. and against the peace, &c. And that the inhabitants of the West-Riding of the county of *York* aforesaid of right ought to repair and amend the said ruinous bridge when and so often as need requires it.

To this the defendants pleaded, that after the making of a certain act of parliament in the 17 Geo. 3. (c. 102.) intitled, an act for repairing and widening the road from the town of *Skipton* to the turnpike road leading from *Leeds* to *Rippon*, near *Okebeck* in the township of *Bilton* with *Harrowgate*, and from thence to communicate with the road leading from *Knaresbro'* to *Wetherby* in the West-Riding of the county of *York*, to wit, on the 1st *December* 1779, the said bridge in the said indictment mentioned, the same being and consisting of one arch made of stone and timber, was first directed and made by the order and direction of certain trustees in the said act of parliament named, in pursuance of and according to the directions in the said act in that behalf contained, and for the purposes in the said act in that behalf mentioned, in and upon the said road in the said act mentioned; and that no bridge had ever been there erected or made before the time of the making of the said bridge in the said indictment mentioned, &c. To this there was a demurrer.

Hobroyd in support of the demurrer. The county at large is *prima facie* liable to the repair of all public bridges within its limits, in the same manner as parishes are bound to repair all public highways within their district, unless they can shew a legal obligation on some other persons or public bodies to bear the burthen. This is most explicitly stated by Lord *Coke*, 2 Inst. 700-1, in his comment on the stat. of bridges, 22 H. 8. c. 5, which was made in affirmance of the common law. The matter stated in the plea is no answer to the indictment; because though the bridge in question were built by

(1) Vide the *Earl of Clancricarde v. Stokes*, 7 East, 516. 1 Chitt. Pl. 358.

the trustees, yet the law not having imposed on them the burthen of repair; it necessarily devolves on the county: for the demurrer admits that it is a common public bridge used for all the King's subjects. If indeed a miller make a new bridge over a new cut of water *for his own profit*, the county shall not be bound to repair it, though it be used by the public; according to 1 Roll. Abr. 368. But there it does not appear to have been made for the common benefit; and the same book recognizes the general law. By 13 Rep. 33, it appears that others than the inhabitants of the county can only be charged *ratione tenuræ*, or by prescription in the case of bodies corporate, or as it is said on account of taking toll or other profit: but this latter must be understood of toll claimed by prescription or grant upon condition of bearing the burthen of repair, and where the party takes such toll for his own profit; which does not apply to these trustees, against whom no indictment will lie for non-repair. Nor could they by any mode be made personally liable, or be made to lay out any thing beyond the amount of the tolls received; wherefore, if the expence of the repair wanted exceeded that sum, the public would be without remedy unless the county were liable. To an indictment against the county of *Middlesex* for not repairing *Langforth* bridge, Cro. Car. 365, alleged to be an ancient bridge, the defendants, protesting it was not an ancient bridge, pleaded that it was lately erected by the King for the benefit of his mills; and judgment was given for the King; though it do not expressly appear whether upon the form or merits of the plea. In *R. v. the County of Wilts(a)*, *Northey*, Attorney-General, cited a case where it was adjudged, that if a private person build a bridge which afterwards becomes a public convenience, the county is bound to repair it. So *R. v. Bucknal*, 6 Mod. 151, n. The authorities on this subject were all considered in *Rez v. the W. R. of Yorkshire*, 5 Burr. 2594, in the case of *Glusburne* bridge, where to an indictment against the Riding for the non-repair, the plea stated that there was an ancient foot bridge over the same stream which the township of *Glusburne*, who were bound to repair it, took down, and in lieu thereof erected the carriage bridge in question: and all the Court held the Riding liable to the repair on the general principle above stated by *Northey*. That case has been uniformly acted upon ever since; and in particular in the instance of *Lamsbeck* bridge, upon an indictment tried before Mr. Justice *Buller* on the Northern circuit. If it were otherwise the greatest inconvenience would ensue: for the subjects at large cannot know what particular persons are liable to the repair of public bridges: they can only resort to the county in the first instance; and they must be liable unless they can shew some other who is so bound. He also referred to several clauses in the particular act in question.

Lambe, contra, admitted that the stat. 22 H. 8. c. 5, was in affirmance of the common law; but said it was to be collected from thence that the liability of the county to repair was confined to *ancient* bridges, the origin whereof and by whom built and repairable could not be easily traced, and therefore afforded a presumption that they were originally public works. It would be preposterous to suppose a law by which every individual might, by erecting a bridge over which others passed occasionally, thereby bring a great burthen on the public, not merely for the reparation, but in many instances for the entire rebuilding of it. If it had been supposed, that at any rate if the bridge were of public utility the county were bound to repair, it was nugatory to direct the magistrates, as the statute does, to inquire who were bound to the repair. Again, who is to decide, or by what rule, whether a bridge be of public utility or not. If a new bridge be so built as to occupy the whole highway, the public have no choice whether they will use it or not if they pass that way; although perhaps it were not desired, and the passengers might have passed as

(a) Salk. 359, and vide S. C. Holt's Rep. 346.

well without it: or the public would rather have suffered even a trifling inconvenience than have incurred the burthen of repair. The general rule contended for will have the effect of substituting the will or caprice of any private individual in the place of the public discretion. The passage in 1 Roll. Abr. 368, is against the principle contended for *contra*; and so is 13 Rep. 33, which says, that he who has the toll ought to stand to the repair; which comes nearer to the present case than any other authority: for by the act in question the tolls which are collected on this road are vested in the trustees, by whom the bridge was built, for the very purpose of keeping it in repair. The *Glusburne Bridge* case, 5 Burr. 2594, is distinguishable from this; for that was found to be of *public utility*, as well as constantly used by the public; and what is still more important, the justices of peace in Quarter Sessions, who are the trustees for the county in this respect, signified the public assent to its erection, by contributing to the expence of it out of the public stock: it may therefore be said to have been erected, by and for the benefit of the county; in which case they could not discharge themselves by any protest from the burthen of future repair attaching on them by law. In another report of the same case, 2 Blackst. 687, great stress is laid on the fact of its being of public utility: it is said to be the grand criterion. There was no necessity to traverse that this was a common public bridge, because the plea shews that before 1779 there was no bridge there; and therefore, unless the county are bound to repair all new bridges erected by any persons, which the public may happen to use, they cannot be liable in this instance. The *Langforth Bridge* case, Cro. Car. 366, did not establish so general a position; for that turned on the form of the plea. And it was admitted by the Court in the *Glusburne Bridge* case, 2 Blackst. 687, that if a man erected a bridge principally for his own benefit, though collaterally of benefit to others, the public had nothing to do with it. He also argued upon some of the particular clauses of the act in question; particularly, that the clause providing against the discharge of any Riding, &c. or private person chargeable with the repair of any road or bridge by reason of tenure, or by any law, ancient usage, or custom, must necessarily refer to bridges antecedently built; such ancient bridges as were intended by the stat. 22 H. 8.

Holroyd, in reply, observed, that a bridge built by the trustees of a public road, under an act of parliament, must be taken to be of public utility in point of fact. That if a bridge built in a public road by an individual were not of public utility, but detrimental to the public, it would be indictable as a nuisance; and that would be matter of defence on the trial; but the demurrer, by admitting that it is a common public bridge used by all the king's subjects, has admitted its adoption by the public and its utility.

LORD ELLENBOROUGH, C. J. This is a case of great consequence indeed to the public, but after the decisions which have taken place, it does not appear to be of much difficulty. By the common law, counties are chargeable with the repair of public bridges; unless it be shewn, as the stat. 22 H. 8. c. 6, says, "what persons, lands, tenements, and bodies politic, ought to make and repair such bridges." In the absence of such proof, that burden is, by the operation of the common law, thrown on the inhabitants of the county in which the bridge lies(1). But in order to effect this, it is not enough that a new bridge shall be built in a highway used by the public; it must also be useful to the public: but enough is stated to shew that; the bridge being alleged to be in a public highway, and used for all the king's subjects: it is at least sufficient to throw the *onus* upon the inhabitants of the county of shewing who else is bound to

(1) Vide *The King v. The Inhabitants of the county of Bucks*, 12 East. 192. The county are also liable to repair to the extent of 300 feet of the highway at each end of the bridge. *The King v. The West Riding of York*, 7 East, 568.

the repair, if they be not. I do not lay stress on the idea of the public having adopted the bridge, by passengers going over it; because if it occupy the highway, they cannot help using it: I only rely on the using of it so far as to shew that it does not appear to have been treated as a nuisance, but to have been acquiesced in by the public. If, however, it be built in a slight or incommodious manner, no person can, at his choice, impose such a burden on the county, and it may be treated altogether as a nuisance, and indicted as such. But if the public lie by without objection, and make use of it for some time, it is evidence that they adopt the act; and the bridge becoming of public benefit, the burden of repair ought properly to fall upon the public. Lord Coke, in his comment 2 Inst. 700—1. on the stat. 22 H. 8. of bridges, after stating that particular persons are only bound *ratione tenuræ*, or by prescription; that is, *ratione tenuræ* in the case of private individuals; or by prescription, as against corporate bodies; puts this case: "But admit none at all were bounden to the reparation of the bridge by who should it be repaired, by the common law? The answer is By the whole county, &c. wherein the bridge is, &c.; because it is for the common good and ease of the whole county." Again he says, "if a man make a bridge for the common good of all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but *ratione tenuræ prescriptionis*." Now, that this bridge is for the common good is proved by the use of it by all the king's subjects passing that way, by its not having been treated as a nuisance, but acquiesced in. Then after having enjoyed the benefit of it, shall the public object to it when they begin to feel the burden of repair. The doctrine laid down by Lord Coke has been since recognized in the cases referred to, and in other books; particularly it was much considered in the case of *Glusburne Bridge*, 5 Burr. 2594, upon the authority of which other cases have been since ruled, one of which was alluded to at the bar, before Mr. Justice Buller. The rule laid down by Mr. Justice Aston, in the *Glusburne Bridge* case seems to be the true one; "that if a man build a bridge, and it become useful to the county in general, the county shall repair it(1): He says nothing about the adoption of it by the public; and there is good sense in not relying on that, except as evidence of its being a public bridge, and of utility to the public. Where it is stated to be used by the public, it cannot be presumed to be useless to them: but if intended to be objected to on the ground of inutility, it must be so stated in the plea. As to the objection, that it ought to be repaired by the commissioners of the turnpike by whom it was erected, and who have authority to raise tolls for the purposes of the act; I cannot find any authority for them to erect bridges under this act. Where it is necessary to cut drains in the adjoining lands, a power is given them to raise arches over such drains; but this is a bridge built in the highway. However, not to proceed upon any such narrow view of the case, I will suppose they were authorised to erect the bridge; yet no fund having been specially provided by the legislature for the repair of it, the burden must necessarily fall where the common law has placed it, namely, on the Riding. I am aware of the extent of this opinion; and if the trustees under similar acts throw this burden generally on the counties, it may be necessary to make special legislative provision in future; but this cannot vary the common law rule: and I see no reason to arraign the doctrine in the case in 5 Burr. to which I have referred. If, indeed, as it is said in 1 Rol. Abr. 369, a man make a new cut for the benefit of his mill, and build a bridge over it, he shall be bound to the repair of it. But that is a case where the party is guilty of a nuisance in the first instance in making a new cut across

(1) The property in the materials of the bridge when built and dedicated to the public still continues in the builder, subject to the right of passage in the public; and if they are covered and taken away, he may maintain trespass. *Harrison v. Parker*, 6 East, 154.

the highway, which the public might have prevented, and all along he continues it for his own benefit: the case goes no further than that; and does not apply to the present.

GROSE, J. In the present state of the country, when great improvements are carrying on, and convenient bridges are become very necessary, this is a most material question to be settled. It is no new point: for I well remember the *Glusburne Bridge* case, which was most ably argued by the counsel for the Riding, who was a profound lawyer, and had exerted great industry in looking into all the authorities on the subject; and the case was decided on great consideration. Since then, the same question has come before many of the judges at *nisi prius*, and the same doctrine has been repeatedly considered and acted upon. Those who then doubted upon the subject did not sufficiently attend to this, that the stat. 22 Hen. 8, was founded on the common law; and the passages referred to in 2 Inst. are very strong to that purpose. Indeed, Lord Coke may be said to state this very case when he says, that if a man build a bridge for the common good of all the subjects, he is not bound to repair it. Then where no particular person is bound to the repair, how and by whom shall it be done? He had before answered that question; that it shall be repaired by the whole county. Mr. Justice Astle, commenting on this doctrine in the *Glusburne Bridge* case, says, that it does not relate to new bridges which are not of public utility, and used by the public. But the bridge in question appears to be of this description; and like that case, except in this particular, which is stated by the defendants themselves in their plea, that this bridge was erected by trustees of a turnpike road, under a public act of parliament; and therefore, I cannot suppose that it was not a public bridge, built for the benefit of the public, and of public utility; and not merely for ornament or for private benefit. This case, therefore, comes within the rule laid down in 5 Burr.; which having been acted on ever since, it would be dangerous to draw into doubt. There may be attempts to make a colourable use of this doctrine, as by building bridges at first in a slight and imperfect manner, for the purpose of throwing the expence immediately on the county; but if that were shewn I should think it was a public nuisance, and indictable. The general doctrine, however, is too firmly established since the case in *Burrow* to be overturned.

LAWRENCE, J. The principle to be collected from the case of *Glusburne Bridge* is, that if the bridge be of public utility the county who derive advantage from it must support it. It so appears both from the report in *Burrow* and in *Blackstone*. But it is said, that we cannot collect that the bridge in question is of such a description. But when we observe that it was erected by trustees of a turnpike road appointed by an act of parliament, we cannot suppose that it was erected for other purposes than for the public utility. Then this was assimilated to the case in 1 Rol. Abr., because it is said that the trustees are empowered to take tolls. But that is supposing that the trustees are to derive some private advantage from the tolls, which is not the case: whatever tolls are raised must be laid out on the maintenance of the roads. It might as well be contended, that if a parish were to build a new bridge on a road within their limits, they would be bound to keep it in repair afterwards, and that the county would not be liable, as that the trustees are in this case, because the bridge is built in the turnpike road. In truth, the trustees are merely substituted in lieu of the parish. The case of *Glusburne Bridge* has been affirmed by subsequent decisions. One of these was *The King* against the *Inhabitants of the County of Lancaster*, where a special verdict was found; which was argued before my brother *Le Blanc* and myself, sitting in bank at *Lancaster*. I mention this, because it was in a shape in which it might have been carried to another tribunal, if the parties had been dissatisfied with our opinion. He then read another case of *The King v. The In-*

habitants of the West Riding of Yorkshire, M. 28 Geo. 3. (*infra*(a)). On the authority of these and the other cases mentioned, I agree that there ought to be judgment for the King.

LE BLANC, J. If the court felt any doubt upon the question, the magnitude of it would have induced them to have heard another argument. But the principle on which the case in 5 Burr. was determined, and which equally governs the present, was not new even at that time : for it is laid down in 2 Inst. that if a man build a bridge which is for the public benefit, the public

(a) THE KING v. THE INHABITANTS OF THE WEST RIDING OF YORKSHIRE.

Mich. 28. G. 3.* B. R.

Where to an indictment against a Riding for not repairing a public carriage bridge, the plea alleged that certain townships had *immemorially* used to repair the said bridge ; evidence that the townships had enlarged the bridge to a carriage bridge which they had before been bound to repair as a foot bridge, will not support the plea. Where townships have so enlarged a bridge which they were before bound to repair as a foot bridge, they shall be liable *pro rata*. Where an individual builds a bridge which he dedicates to the public, by whom it is used, the county are bound to repair it.

The inhabitants of the Riding were indicted for not repairing a public carriage bridge, which they were bound to repair, &c. Plea, that certain townships have *immemorially* repaired, and have been accustomed and of right ought to repair the said bridge : and issue thereon. It appeared upon the trial, that this had been a foot bridge till the year 1745, when it was enlarged to a horse bridge by the townships, and in 1755 to a carriage bridge, at their expense. That the Riding had never repaired it. There was another bridge which served for the same road.

The counsel for the prosecution insisted at the trial that the evidence did not prove the issue ; which was that the townships had *immemorially* repaired a carriage bridge ; as it appeared clearly that the carriage bridge had been first erected within time of memory. And Wilson, J., who tried the cause, was of that opinion : but the jury found for the defendants.

A new trial was moved for, and Wood, Heywood and Lambe, for the defendants shewed cause, by contending that though the evidence might not strictly support the prescription as laid ; yet, if by another form of pleading the defendants would have been entitled to a verdict on the merits, the Court would not be inclined to set aside the verdict. That in order to change the Riding with the repairs of a bridge, it must at least appear that it was of public utility ; which this was not ; for the turnpike road ran within a few yards, and it was stated that there was another bridge. That the townships would thereby get rid of the obligation to support a foot bridge. This was not like the case of *Glusburne Bridge*, 5 Burr. 2594, which was an entire new bridge, 60 yards distant from the old foot bridge. This was the old foot bridge widened.

The counsel on the other side were stopped by the Court.

ASHHURST, J. There must be a new trial ; for by the general law it is established, that where a township or any private individuals build a new bridge and dedicate it to the public benefit, and it is used by them, the *onus* of repairing it will fall upon the county at large ; for the county at large are bound to repair all public bridges, unless they can throw the burthen on some particular persons. Now here the Riding have pleaded that these townships have been *immemorially* bound to repair this carriage bridge ; which cannot be true, as it appeared from the evidence that it was not made a carriage bridge till a few years ago. Therefore, there must be a new trial.

BULLER, J. The indictment states it to be a carriage bridge, and the defendants in their plea admit it to be a carriage bridge. But they allege that other persons are bound by prescription to repair it. Now there is no evidence whatever which tends to support that : on the contrary, it is shewn that this never was a carriage bridge till within these few years, but was a foot bridge, which was kept in repair by the townships. Where a party is bound to repair a foot bridge, he shall not discharge himself by turning it into a horse or carriage bridge ; but still he shall only be bound to repair it as a foot bridge ; that is, *pro rata* : but otherwise the county are bound to repair all bridges of public utility.

GROSE, J. declared himself of the same opinion(1).

The Court offered the defendants liberty to amend on payment of costs, which not being accepted at that time(a).

Rule absolute.

* This note was taken by the author.

(1) Vide *Rex v. Inhabitants of Surry*, 2 Campb. 455.

(a) Qu. if the defendants did not afterwards amend their plea, before the second trial, and obtain a verdict ?

must repair it. That has been acted upon down to the period when the *Glusburne Bridge* case was decided; and that again has been recognised in subsequent cases, and particularly in one instance, where the parties had an opportunity, if they had been so advised, of carrying it to the dernier resort. The question then is, Whether there be any distinction between this and the other cases? As to this not being expressly stated to be for the public benefit; it is sufficient when the indictment states that the bridge was used for all the king's subjects. Then it is said, that this was not built, as in other cases mentioned, by a private individual, but by trustees under an act passed for making a public road. If, however, the cases are to be distinguished on this ground, this rather appears to be a stronger case than the others; because the bridge was built by trustees under an act of parliament, to which the defendants must be considered as parties and assenting, and by those to whom the legislature have delegated the trust of determining whether it were proper to build the bridge: it is therefore a stronger case against the defendants than where an individual has in the first instance exercised his own discretion. If any inconvenience be to ensue from this decision, it must be provided for by the legislature in future acts of this description. The clause referred to in the act which enables the trustees to cut drains and throw arches over them is confined to grounds lying contiguous to the roads, and was merely for the purpose of excusing them from being considered as trespassers, and not by way of throwing on them an additional burden of repairing such bridges. And the subsequent clause, which provides "that nothing in this act contained shall be construed to be a discharge of any riding, &c. or person, for making, repairing, &c. any road, bridge, causeway, arch, drain, or sewer, which they have been accustomed, or of right ought to make, repair, &c. by reason of any tenure, or by any law, ancient usage, or custom," affords an argument that this act was not intended to make any alteration as to the general legal liability under the stat. 22 H. 8, or by the common law, either as to the repair of roads or bridges. If this be the true construction, then it stands thus: Certain persons are enabled by law to make a public bridge, and by the general law before public bridges were repairable by the public: and by the clause referred to, the legislature in the particular act have in effect provided, that notwithstanding that act, the same persons should continue liable, as were before liable, to the repair of bridges, &c. Then the defendants must be liable in this case, there being nothing shewn to exempt them, and throw the burden on others.

Judgment for the Crown(a)(1).

(a) The KING against the Inhabitants of the County of GLAMORGAN.—An indictment having been removed in *Hilary* term 1788, by writ of *certiorari* into the court of King's Bench, against the defendants, for not repairing a certain public bridge called *Yaispenlweh* bridge, erected in the King's highway, across the river *Tawe*; the defendants pleaded; that in the year 1745, *Herbert Mackworth*, Esq. being seized of certain tin works, for his private benefit and utility, and for making a commodious way to his tin works, erected the bridge; and that he and Sir *Herbert Mackworth* his son, and their tenants of the tin works, enjoyed a way over the bridge for their private benefit and advantage; and therefore that Sir *H. Mackworth* ought to repair, *absque hoc*, that the inhabitants of the county ought to repair. The prosecutor replied, that the inhabitants of the county ought to repair. And upon the trial at the Summer assizes for the county of *Hereford* before *Kenyon*, the facts alleged in the plea were proved: and also that the business of the tin works could not be carried on without the use of the bridge. But it also appearing, that the public had constantly used the bridge from the time of its being built, his Lordship directed the jury to find a verdict for the crown, *viz.* that the inhabitants of the county were bound to repair; which they did accordingly, and no motion was ever made for a new trial. [S. C. cited 1 Bac. Abr. 535, Gwil. ed. But where a company were bound by a local act to leave other bridges and highways equally convenient in lieu of such as they should alter, it was held that such company were liable to repair a bridge which they had erected over a ford in the common highway which they had destroyed by deepening its bed. *The King v. The inhabitants of the County of Kent*, 13 East 220.]

(1) [See *Union Canal Co. v. Pinegrove Township*, 6 W. & S. 560.—W.]

The King v. Pinkerton.

2 East, 357. May 24, 1802.

Where a defendant is brought up to receive judgment after conviction, an affidavit, by the prosecutor in aggravation, stating that a third person, who refused to join in the affidavit, had informed him that the defendant, after the trial, had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least not without swearing that such third person was under the control or influence of the defendant.

THE defendant, having been convicted on an indictment for a libel, was now brought up to receive judgment, when an affidavit made by the prosecutor was offered to be read in aggravation, wherein he swore that a Mr. *Taylor* had informed him of certain expressions made use of by the defendant to *Taylor* (being in effect repetitions of the libellous matter) since the trial. That application had been made to *Taylor* to join in the affidavit, who declined doing so, as not wishing to urge the aggravation of punishment; but when shewn the affidavit of the prosecutor, admitted the truth of the statement. This was attempted to be supported on the authority of *The King v. Archer*(a), and the practice since that determination.

Gibbs, objected to the reading of such an affidavit: and questioned the propriety of that determination, as contrary to the established rule, that hearsay is no evidence. It was in effect calling on the defendant to answer a charge not made upon oath; for it might be true, that *Taylor* told the prosecutor that the defendant had uttered the libellous expressions, and yet it might not be true that the defendant had so said; and thus the defendant might be prejudiced by the imputation of a fact, for which, if false, no person could be indicted for perjury. It was clear that this would not be evidence against the defendant at the trial: then why should it be evidence against him when brought up to receive judgment. Admitting, however, that the defendant was allowed time to answer and deny the charge if he could, yet as he must be committed in the mean time, the effect of punishment was answered, though he might afterwards be able to clear himself. In all other cases it happened that the adverse parties were at issue on the material facts; but here the defendant could not deny that the third person gave the information sworn to, but only that he himself did not say what was imputed. At any rate, he observed, that this was so far distinguishable from *Archer's* case, that there, the party refusing to make the affidavit, whose information was admitted on hearsay, was at least sworn to be under the influence of the defendant, which was not stated in this affidavit.

Erskine, on the other hand, relied on the authority of *Archer's* case, which had been continually acted upon in practice ever since. Whatever the rule was, it would be equally favourable to the defendant as to the prosecutor: it was open to the former to make the like affidavit of what had been said by the prosecutor to a third person, which went in destruction of the prosecution or mitigation of punishment. He admitted, that the defendant might receive a prejudice in the manner stated from such an affidavit, although ultimately no person could be indicted for perjury; but this objection, he observed, applied as well to every case where the conversation deposed to only passed in the presence of the party deposing.

LORD ELLENBOROUGH, C. J. Without entering into the merits of the determination in *The King v. Archer*, which I am not prepared to say that I should have concurred in at the time, it is enough to observe, that this is clearly distinguishable from that case; because it is not here sworn that *Taylor* was under the control or influence of the defendant.

(a) 2 Term Rep. 208. n.: and vide Kel. 55. pl. 5, and *Res v. Joliffe*, 4 Term Rep. 200, and *Res v. Wilson*, ib. 488.

GROSE, J. The precedent of *The King v. Archer* ought not to be carried further than that case.

All the Court concurred in rejecting the affidavit.

Trier v. Bridgman.

2 East, 359. May 28, 1802.

Bail in error are not required by stat. 3 Jac. 1. on error brought on a judgment by default in debt on a count for a promissory note, any more than on counts for goods sold and delivered, and on an account stated; though if there were one count, on which judgment was entered up, for which bail in error were not required, it seems sufficient to excuse the plaintiff in error.

BEVAN obtained a rule *nisi* for staying proceedings pending a writ of error, upon a judgment by default, in an action of debt on a promissory note, and for goods sold and delivered, and upon a *quantum valebant*, and upon an *insimul computassent*.

Espinasse shewed for cause, that no bail in error had been put in, as required by stat. 3 Jac. 1. c. 8, in actions of debt upon any contract; the promissory note being, he said, a contract for a sum certain and payable at a certain time; and therefore distinguishable from the case of *Albet v. Ellis*, 1 Bos. and Pull. 249, where the counts were only for work and labour, goods sold and delivered, money had and received, and on an account stated.

LORD ELLENBOROUGH, C. J. At the time of passing the stat. 3 Jac. no such action of debt could be maintained on a promissory note: it might have been evidence of a debt, but it did not constitute a debt *per se*. The stat. 3 & 4 Ann. c. 9, first gave an action upon such an instrument; before which neither the payee nor indorsee, could have sued the maker upon the note. And if there be one count in the declaration on which judgment is entered up, on a cause of action for which debt would not lie at the time of the stat. of James, no bail in error is required.

Bevan, in support of the rule referred to *Alexander v. Bliss*, 7 Term Rep. 449, and *Gerling v. Baker*, Yelv. 227. 2 Bulstr. 53. S. C., to shew that bail in error could not be demanded upon the other common counts.

LORD ELLENBOROUGH, C. J. then observed, that as it appeared upon the authority of those cases, that bail in error was not necessary, either on the count for goods sold and delivered, or upon the *insimul computassent*, there was no one count in the declaration on which it could be required(1).

Per Curiam,

Rule absolute(a).

The King v. Cator.

[S. C. at *Nisi Prius*, 4 Esp. 117.]

2 East, 361. May 31, 1802.

After judgment on the defendant for a libel, the court refused to make an order on the prosecutor to deposit the original libellous papers with the officer of the Court.

THE defendant having been convicted of writing and publishing a libel in certain letters to Mr. Jackson, was brought up this day in custody to receive the judgment of the Court, who thereupon sentenced him to pay a fine of £200. to the King. After which

(1) Vide *Webb v. Geddes*, 1 Term. 540.

(a) Vide *Bidleson v. Whytel*, 3 Burr. 2445.

Adam moved, on behalf of the defendant, that the Court would direct that the original letters, which had been proved at the trial, might be delivered up by the prosecutor, and deposited with the officer of the Court.

Garrow for the prosecution, after noticing the singularity of the attempt, said that the prosecutor, having received previous intimation of such a motion being intended to be made, had furnished him with the original letters, which he then had in court ready to obey whatever order the Court might think proper to make. But

GROSE, J. (in the absence of Lord *Ellenborough*), after consulting with the other Judges present, said, that the motion was unprecedented, and not fit to be entertained; and therefore, they should not make any order upon the subject: and he even doubted whether they had now any authority to make such an order on the prosecutor, who was out of court.

The King v. Steventon and Others.

2 East, 362. May 31., 1802.

1. The st. 26 G. 3. c. 77. s. 13, which enacts that no person shall prosecute "any action, bill, plaint, or information in any of the King's courts" for the recovery of any Excise penalty, &c. unless prosecuted by the Attorney-General, or some revenue officer, is confined to the superior courts of record; and therefore, an information for a penalty for removing wax candles from the place of manufactory before the duty paid (by s. 10, of the same statute) may be prosecuted before the commissioners of Excise by one not averred to be such officer. 2. And the information stating in effect that the candles were home-made candles seems to be sufficient, without expressly naming them *British* candles; the words of the act being "*British* spirits, soap, and candles;" though supposing this would have been a ground for error or appeal in the original information, it is no objection to an information in a collateral proceeding for conspiring to prevent the examination of a witness before the commissioners of Excise on such prior information, which is only stated by way of recital in the information for the conspiracy. 3. The same answer applies to an uncertainty (if any) in the charge of the first information recited: it negativing the excuse of a prior condemnation as well as prior payment of the duty before removal; though that seems proper enough. 4. So the issuing of process against the original defendant, or the joining issue on the information recited, is immaterial as to the charging the offence of the subsequent conspiracy. 5. Neither is it necessary, at least in such collateral proceeding, to recite that the original information was prosecuted before the commissioners by name, though it be not averred to have been before three or more of them, according to stat. 1 Geo. 2. st. 2. c. 16. 6. Neither is it necessary in reciting such prior information averred to have been made within three months after the offence committed, according to stat. 1 W. & M. c. 54. s. 13. also to aver notice thereof to the original defendant within a week, as is directed to be given by the same statute. 7. Where the stat. 7 & 8 W. 3. c. 30. s. 24, enables the commissioners of Excise to summon witnesses before them, upon a charge exhibited against another for an offence against the Excise laws, and an information in a collateral proceeding recited such summons to have been duly made; proof of a printed summons distributed and issued in blank by order of the commissioners to their agents, and afterwards filled up by one of the latter without any special directions from the board, is sufficient, although not signed by any of the commissioners, nor issued in their individual names; such having been the constant usage in that respect since the introduction of the Excise.

AN information was filed by the Attorney-General against the defendants, stating, That on the 2d of *December* 1800, at the chief office of Excise in *London*, (to wit) at, &c. *W. Pilkington*, gentleman, as well for the King as for himself, exhibited before the commissioners of Excise a complaint and information, and thereby informed the said commissioners that within three months then last past, (and within the limits and jurisdiction of the said office of commissioners,) to wit, on 25th of *October* then last past, at the parish of *St. Martin in the Fields* in the county of *Middlesex*, one *William Forge* did knowingly receive, and then and there had in his custody and possession, a large quantity, to wit, 1494lb. of candles, to wit, wax candles of a large value, to wit, of the value of 250*l.*; after the said wax candles had been re-

moved from the place where the same were made and manufactured, and where the same ought to have been charged with the duties payable in respect thereof before the said duties to which the same were liable had been charged, or before the said wax candles had been lawfully condemned as forfeited, contrary to the form of the statute, &c. whereby and by force of the said statute the said *W. Forge* had forfeited and lost the said wax candles, and also treble the value thereof; and thereupon the said *W. P.* prayed judgment of the said commissioners in the premises, and that he might have one moiety of the said forfeitures according to the form of the statute, &c.; and that the said *W. Forge* might be summoned to answer the said premises, and to make defence thereto before the said commissioners. It then stated, that the said commissioners afterwards, and whilst the said information was depending and undetermined, to wit, on the 22d of *January* 1801, at the said chief office of Excise in *London* aforesaid, to wit, at, &c. caused to be issued their summons in writing to one *Edward Baythorne*, who then and there was a material witness on the part of the said *W. P.* touching the matters, &c. thereby requiring the said *E. B.* personally to be and appear before the said commissioners, &c. at the chief office, &c. on, &c. then and there to give evidence, &c. in the cause depending between the said *W. P.* informer, and the said *W. F.* defendant, which summons afterwards, to wit, on, &c. at, &c. was in due form of law served on the said *E. B.* It then charged, that the defendants *W. Forge*, *Anthony Steventon*, attorney at law, and *Joseph Vicars*, well knowing the premises, but unlawfully, &c. intending to obstruct the due course of justice, and to deprive the said *W. P.* of the benefit of the evidence of the said *E. B.* touching the matters, &c. on, &c. (and before the said information came on to be heard and determined) with force and arms, at, &c. unlawfully, &c. did conspire and prevent the said *E. B.* from appearing and attending the said commissioners of the said chief office in *London*, according to the exigency of the said summons, and from giving his evidence touching the matters specified in the said information there; and in pursuance of the said conspiracy, &c. he did solicit the said *E. B.* not to appear before the said commissioners, &c. to give evidence, &c.; and in pursuance of the said conspiracy, &c. on, &c. at, &c. did pretend and affirm to the said *E. B.* that the sum of 10*l.* would exonerate him the said *E. B.* from any trouble or expence he could be put to by reason of his not appearing before the said commissioners to give evidence, &c.: and that they would exonerate him, &c.: by reason of which said premises the said *E. B.* did not attend to give evidence before the said commissioners at the chief office of Excise in *London*, according to the exigency of the said summons, as by law he ought to have done, to the manifest obstruction and hindrance of justice, &c. There was another count not materially different from the first. The defendants pleaded not guilty.

After conviction before Lord *Kenyon*, C. J. at the sittings after last *Trinity* term,

Erskine and *Gurney*, in *Michaelmas* term last, moved for a new trial, and also in arrest of judgment.

The grounds of the motion for a new trial were these: that whereas the foundation of the offence imputed to these defendants arose out of a proceeding before the commissioners of Excise, it was incumbent on the prosecutor to prove according to the allegations in the count, that the original information was *duly* exhibited before such commissioners, and that the summons issued by them to *E. Baythorne* the witness was a legal summons. The stat. 7 & 8 *W. 3. c. 30. s. 24*, enacts, "that the commissioners of Excise and justices of the peace respectively, upon any information exhibited before them for any offence committed against the laws of Excise, may summon any person (other than the party accused) to appear before them at a certain day, time, and place, to be inserted in such summons, and to give evidence," &c.

This is a personal authority given to the commissioners and magistrates to be exercised by themselves, and cannot be deputed by them to others. But the summons proved at the trial was a printed form, not signed by any of the commissioners, nor even by Mr. *Mayhew* the Solicitor of the Excise (supposing, which they denied, that the commissioners could devolve their authority on him), but merely with the name of *Mayhew* printed at the bottom, which forms of summons it appeared were distributed to inferior agents in the country. The summons in question issued out of Mr. *Mayhew's* office, but no evidence was given that it had been issued by his special direction in the present instance. It was also objected that the commissioners should have signed the information, as well as the summons, in order to denote their sanction of it. But this last objection was never pressed again. As to the other,

Lord KENYON, C. J. in reporting Mr. *Mayhew's* evidence said, that the form of the information before the commissioners, and that of the summons as proved by him at the trial, were such as had at all times been used within the witness's remembrance above 30 years, and such as he found, on inspection, had been used before his time.

The defendant's counsel insisted much on the illegality of such a practice, which they said no usage could legalize. That many acts of parliament gave justices of peace a power to issue summonses, as in the instance in question; and it never was conceived that they could delegate such authority to be exercised by another; but that every such summons had the signature of the magistrate in whose name it was issued. That the same clause (24) of the stat. 7 & 8 W. c. 24. gave a forfeiture against the party neglecting to comply with the summons, which strengthened the necessity of a strict construction of the power. That such powers delegated to inferior agents, without responsibility, would be liable to great abuse and oppression of the subject. And the stat. 1 Geo. 2. st. 2. c. 16. s. 4 and 5. seems to consider otherwise, by directing that all warrants, &c. issued by the commissioners in execution of their adjudications, should be under the hands and seals of three of them, though they be not the same by whom the adjudication was made. And they referred to *Burslem v. Fern*, 2 Wils. 47, to shew that the filling up a sheriff's warrant on a *capias ad respondendum*, after it had been signed, sealed, and issued by the sheriff, made it void.

The Attorney-General, contra, was stopped by the Court.

Lord KENYON, C. J. The Court ought not to suffer the question to be agitated, Whether a summons which has issued from these commissioners in the usual course of office, according to their constant practice, and in conformity with the practice of the superior courts, is not regular? Subpœnas are constantly issued in this manner: they are sent down in blank into the country, and there filled up; and in the same manner are jurors summoned by the sheriff to attend the assizes, without his signature to the process. I am afraid of shaking the practice of all the courts and judicial officers in the kingdom. As to justices of peace, I will take for granted that they always sign the summonses issued by them, as they have been used to do.

GROSE, J. To shew how far custom will bind in these matters, there is no other authority than that for trying prisoners at the *Old Bailey*, for *Middlesex*, as well as *London*.

Per Curiam,

Rule for a new Trial discharged,

The defendants' counsel then took several objections, in arrest of judgment;—1. The stat. 26 Geo. 3. c. 77. s. 13, enacts, "That it shall not be lawful for any person whatsoever to commence, prosecute, enter, or file, or cause or procure to be commenced, &c. any action, bill, plaint, or information in any of his majesty's courts, against any person, for the recovery of any fine, penalty, or forfeiture, incurred by virtue of any act or acts now in force or hereafter to be made relating to the revenues of Customs or Ex-

"cise, unless the same be commenced, &c. in the name of the attorney-general, or of some officer of some or one of his majesty's said revenues." And all other proceedings in that respect are thereby declared to be null and void. It was contended that the commissioners of Excise were constituted a court, for the purpose of hearing and determining complaints relative to that branch of the revenue; and therefore, that no information could, by the express provisions of the statute, be instituted before them, except by the Attorney-General, or one of the revenue officers; and *William Pilkington* not being averred to be of the latter description, the whole proceeding was coram non iudice, and consequently it was no offence in the defendants to have prevented any person from appearing as a witness before them. That the occasion of making such provision was, that before that time offenders against the Excise laws fraudulently procured their friends to commence prosecutions against them, which were afterwards faintly and insufficiently carried on; in consequence of which the offenders either wholly escaped punishment, or received less than they deserved. This was provided for as to informations, &c. in the superior courts of *Westminster* and *Edinburgh*, by the stat. 12 Geo. 1. c. 28. s. 28, which expressly mentions those courts. Then the only reason for making the provision in question in more general words in the stat. 26 Geo. 3. c. 77. s. 13, was to include other courts than such superior courts; and the expression, *any of his majesty's courts*, evinced such an intention: otherwise the latter statute was nugatory. It could not be supposed that the legislature only meant to suppress such frauds in the superior courts of *Westminster*, and to leave them still open to be practised before the inferior tribunals, where it was probable the greater mischief lay. That where the superior courts of *Westminster* were alone intended in an act of parliament, they were always either so named, or at least under the general designation of *The Courts of Record*; that being considered as an appropriate technical description by way of excellence: but the words here used, viz. "*any, of his majesty's courts*," were of much larger signification, especially when applied to the subject matter, when it is considered that by far the greatest number of Excise prosecutions are instituted before the commissioners and the justices of the peace, and not in the Court of Exchequer. But even supposing the word "*courts*" must be taken to mean "*courts of record*," yet that the court of the commissioners of Excise was a court of record, as appears from the stat. 1 Geo. 2. st. 2. c. 16. s. 4, which speaks of the *record* of their proceedings, and also from general reasoning and legal analogies. Thus Lord Coke, 4 Inst. 275, speaks of the *Court* of the commissioners of sewers: but their jurisdiction is by no means so extensive as that of the commissioners of Excise, nor of such general and public importance(a). That power of fine and imprisonment was given to commissioners of Excise by some of the early revenue acts, which alone would constitute them a court of record, *Grisley's* case, 8 Co. 38, *Denbawd's* case, 10 Co. 103, *Godfrey's* case 11 Co. 43, Dr. *Grenville v. The College of Physicians*, 12 Mod. 388, and 3 Blac. Com. 24. [*Laurence*, J. observed that Lord Holt's position in the case of the College of Physicians, that a power to fine and imprison makes a court or judge of record, was said by Lord C. J. *De Grey* in 2 Blac. Rep. 1146, not to be generally and universally true.] At any rate, it is sufficient if the commissioners are a court, whether of record or not: and by Lord *Kenyon*, in *Darby v. Baughan*, 5 Term Rep. 210, "commissioners of bankrupt are a court of justice;" though they are no court of record.

2. Previous to the stat. 1 Geo. 2. st. 2. c. 16, all complaints and informa-

(a) In answer to an inquiry directed by the Court to be made during one of the intervals of discussion of this case, it appeared to be the practice of the commissioners of Excise not to receive informations of this sort from any other than their officers; and *Pilkington* was of this description: but it also appeared that such informations contained no averment that the informer was an officer.

tions at the chief office of Excise in *London* were to be heard and determined by all or the major part of the commissioners. Sect. 4. of that statute recites the inconvenience and delay of requiring so many commissioners to attend, and enacts that all such complaints and informations may be heard and determined by any three or more of them; "and that it shall be sufficient in the written account or record of such proceedings, to mention that such complaint or information was made and exhibited to and before three of such commissioners, without particularly mentioning their names, &c. and that every such adjudication and determination of such three or more commissioners, &c. shall be as good and valid in law, and of the same force and effect, &c. as if made by all or the majority," &c. Here then if the information had been averred to have been made before three of the commissioners, it would not have been necessary to have set forth their names: but being only alleged to have been made before the commissioners generally (which words would be satisfied if two only were present), their names ought to have been mentioned by the very admission of the legislature. 3. The information alleged to have been made by *Pilkington*, which is the foundation of the subsequent proceeding, exhibits no legal cause of complaint, of which the commissioners had jurisdiction to inquire: for it is founded on stat. 26 Geo. 3. c. 77. s. 10, which enacts, "that if any person shall knowingly receive, buy, or have in possession any *British* spirit, soap, or candles after the same shall be removed from the respective places where the same were made or manufactured, and where the same ought to have been charged with the duties payable in respect thereof, before the said duties, &c. have been charged, or before such *British* spirits, soap, or candles, have been lawfully condemned as forfeited, the offender, &c. shall forfeit the same, &c. and treble the value." Hereby two distinct offences are constituted; the one, the knowingly having in possession, &c. such candles, &c. after the removal from the place of manufactory before the duties paid; the other, the like having in possession in any place after such removal, before condemnation, without payment of the duties. Upon the face of this information it is left uncertain which of these offences was meant to be charged by the first information recited. [*Lawrence, J.* The effect of the recital of the former information is to aver, that neither the duty was paid, nor the candles condemned, before the removal from the place where the duty was payable.]

4. The word *British* applies as well to *candles* as to *spirits*; and therefore the candles charged to be in *Forge's* possession, &c. should have been averred to be *British*. This is the more material, because foreign candles may be imported on payment of a certain duty, to which the regulation of the statute on which the original information was founded could not apply. [*Lawrence, J.* observed, that the charge in the information following the words of the statute was, that *Forge* knowingly had such candles in his possession after they had been removed from the place of manufactory, and where the same ought to have been charged with the duties payable in respect thereof, before the said duties, to which the same were liable, had been charged; which shewed that the charge could only apply to the removal of home-made candles.]

5. The stat. 1 W. & M. c. 54. s. 13.(a), which limits the information before the commissioners to three months after the offence, also requires notice to be given to the defendant within a week after the information laid; which notice was as necessary to be averred here, as that the original information was within three months, which is stated.

6. It is not stated that issue was joined between the crown and the defendant in the first information recited(b).

(a) The particular statute is applicable to another subject of excise, but general reference is made to it by s. 19 of 26 Geo. 3. c. 77.

(b) The two last and some other trifling objections were urged by one of the defendants.

The Attorney-General, Mingay, Garrow and Wood, contra, insisted as to the 1st objection, that the stat. 26 Geo. 3. c. 77. s. 13, which mentioned any of the King's courts, was confined to the superior courts; for which they went at large into an examination of the body of statutes passed in *pari materia*; which it is not necessary to state, as this, which was the principal objection, afterwards received a full answer from the Court. And they referred to *Gregory's case*, 6 Co. 19. b. Moor, 421. Dy. 236 a. and *W. Jones*, 193, that where a statute gives a remedy in any court of record, (and "any of his Majesty's courts" must be so intended,) it must be understood of the superior courts of *Westminster*; and particularly in the present case, with reference to the stat. 12 Geo. 1. c. 28. s. 28, passed in *pari materia*.

2. The stat. 1 Geo. 2. st. 2. c. 16 s. 4. only relates to adjudications, where the commissioners have proceeded to hear and determine; but here the matter was not heard and determined, but only a summons had issued to a witness to put the matter in train. At any rate it is no more than a question concerning the regularity of process, which cannot be entered into in this collateral proceeding. Whether or not the commissioners have proceeded erroneously in a matter in which it must be admitted they had general jurisdiction, it was still an offence at common law in the defendants to *conspire* to interrupt their proceedings, and to suppress the truth, by keeping back a necessary witness. It would be no less an offence to conspire to present an erroneous indictment for any offence against an innocent person; and an action for a malicious prosecution would lie notwithstanding such error. But the commissioners having jurisdiction to inquire of the original offence, the court would presume that they proceeded regularly, unless the contrary appear.

3. The fact of removal before the payment of the duties is averred, and the only excuse the party could have, which was that the candles had been before condemned, is negatived; therefore there is no uncertainty in the charge.

4. The word *British* is confined to *spirits*, as contradistinguished from *foreign* spirits, mentioned in the antecedent clause, and extends not to *candles* or *soap*; though the act also supposes these latter to be home-made, because it speaks of their removal from the place of manufacture before the duties paid; and so the charge in the information supposes the candles to be home-made: but even if that were matter of error or appeal upon the original information, it is no objection to the present information for a conspiracy.

5. The service of process on such offender is never required to be stated in an information for a collateral offence arising out of it. The act is merely directory to the commissioners how to proceed. Neither could it be stated here; because the time was not arrived for stating such notice when the present offence was committed.

6. No issue is joined in summary proceedings, as in the common law courts; but the party is summoned to appear, and after hearing the charge, is asked *ore tenus* what defence he has to make.

Curia advisare vult.

GROSE, J.(a) now delivered the judgment of the Court. This was a motion in arrest of judgment upon an information, nor necessary to be re-stated, and the principal question agitated was, Whether the stat. 26 Geo. 3. c. 77. s. 13, extends to proceedings before the commissioners of Excise and justices of the peace? not whether they fall within the legal definition of a *court*, but whether the legislature in this clause meant to comprehend them? To shew that they were not meant to be comprehended, it is a circumstance of some weight, that in no act of parliament which has been produced by the defendant are they so described: and upon looking through the several acts, it is clear that they were intended not to be comprehended. By the stat. 12 Cha. 2. c. 23.

(a) Lord Ellenborough was Attorney-General when the case was argued.

s. 31, all forfeitures and offences against that act, within the limits of the chief office in *London*, were to be heard by the commissioners of Excise : and all forfeitures and offences elsewhere were to be heard and determined by two or more justices of the peace, with an appeal to the quarter sessions. By the stat. 15 Cha. 2. c. 11, certain penalties are to be recovered before two justices; and (by s. 25.) all fines, penalties, and forfeitures, for which no remedy was ordained by that act, shall be recovered by action of debt, bill, plaint or information, in any court of record. From this time there were different offences ; some of which were to be punished by proceedings before justices ; others by action of debt, bill, plaint, or information in any of his majesty's courts of record ; and some by subsequent statutes by either mode. The stat. 12 Geo. 1, is confined to *informations*, and did not extend to *actions* ; and the defect in that act was in this respect, and not in its being confined to the court of *Westminster* and *Edinburgh*. To remedy this, the stat. 26 Geo. 3. c. 77, extended the provisions of the stat. 12 Geo. 1, to all the ways by which fines, penalties, and forfeitures imposed by the Excise laws could be recovered in the superior courts ; and the words "action, bill, and plaint" are not inoperative, as was argued : nor are the proceedings against offenders against the Excise laws merely *in rem*, as was supposed. For many statutes authorize proceedings by action to recover penalties under the Excise laws. The stat. 15 Cha. 2, authorizes the recovery by action of debt, bill, plaint, or information, in any court of record of fines, penalties, and forfeitures, for the recovering which no other remedy is given. The stat. 1 Will. & Mary, c. 24. s. 17. gives penalties against brewers of 100*l.* to be recovered by action of debt, bill, plaint, or information, in any of his majesty's courts of record. The stat. 10 & 11 W. & M. c. 24. s. 20, gives the like. So the stat. 18 Geo. 2. c. 26. s. 4, and 24 Geo. 2. c. 40. s. 29. : all these statutes using the same words as the stat. 26 Geo. 2. "action, bill, plaint, and information," speak of courts of record. Therefore, the clause in the stat. 26 Geo. 3, which must be meant to restrain the power given by former statutes, must be understood to refer to the courts mentioned in those statutes. The statutes are all *in pari materia*. The true import of the word "information" *noscitur a sociis*. The above was the only objection which seemed to be relied upon : As to the rest, they were very satisfactorily answered at the bar. For these reasons we are of opinion that the judgment ought to stand.

Rule discharged.

Doe dem. George Allan, John Pease, and Thomas Pease v. John Calvert.

2 East, 376. May 14, 1802.

Under a power in a will to lease in possession and not in reversion, a lease for years executed the 29th of *March* to the then tenant in possession, *habendum* as to the arable from the 13th *February* preceding, and as to the pasture from the 5th *April* then next, &c. under a yearly rent payable quarterly on 10th *July*, 10th *October*, 10th *January*, and 10th *April*, is void for the whole ; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power.

IN ejectment for certain lands in *Yorhshire*, a verdict was taken by consent for the plaintiff, subject to the opinion of the Court on the following case :

Mrs. *Anne Allan* being seised in fee of the lands in question, by her will dated the 28th *January* 1783, duly executed and attested, devised the same to the use of *James Allan* the elder for life, remainder to *George Allan* the elder for life, remainder to trustees to preserve contingent remainders, remainder to *George Allan* the younger (the lessor of the plaintiff) and his assigns for

life, remainder to trustees, &c. remainder to the first and other sons of *George Allan* the younger in tail male, with remainders over. In the said *Anne Allan's* will is contained the following proviso: "Provided always and my will is, that it shall and may be lawful to and for the said *James Allan* the elder, *George Allan* the elder, and *George Allan* the younger, respectively, as and when they shall respectively come into and be in the actual possession of my said hereinbefore devised estates and premises, or any part thereof, or be actually entitled to the rents and profits thereof, or of any part thereof, by indentures under their respective hands and seals to demise or lease the same, or such part or parts thereof, whereof they shall respectively be in the actual possession, or to the rents and profits whereof they shall be respectively entitled, unto any person or persons for any term or number of years not exceeding twelve years *in possession, and not in remainder, reversion, or expectancy*; so as upon every such lease, there be reserved and made payable during the continuance thereof respectively the best improved yearly rent that can be reasonably had or gotten for the same, without taking any sum or sums of money or other thing by way of fine or income for or in respect of such lease or leases; and so as none of the said leases be made dispunishable of waste by any express words to be therein contained: and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved: and that such lessee or lessees, to whom such lease or leases shall be made, seal and execute counterparts of such lease or leases." *Anne Allan* died in *October 1785*. Upon her death, *James Allan* the elder entered, and died seised in *January 1790*: and the late *George Allan* the elder, being then tenant for life in possession of the lands in question, under the devise in *Anne Allan's* will, did, by indenture of lease, bearing date and executed the 29th of *March 1798*, demise the lands in question to the defendant, to hold the same unto the said *John Calvert*, in manner following, *viz.* the tillage ground from the 13th of *February* last past; the pasture ground from the 5th of *April* then next; and the residue of all the premises from the 12th of *May* also then next; for the term of twelve years from the said respective days, under the neat and clear yearly rent of 85*l.* by quarterly payments, *viz.* upon the 10th of *July*, the 10th of *October*, the 10th of *January*, and the 10th of *April*, in every year; and the first payment to be made on the 10th of *July* then next ensuing. *George Allan* the elder died on the 17th *May 1800*; and *George Allan* the younger (lessor of the plaintiff) survived him. The periods mentioned in the *habendum* of the lease, *viz.* the 13th of *February*, the 5th of *April*, and the 12th of *May*, are the usual periods of entry by tenants on arable, pasture, and meadow ground respectively, in the country where the lands in question lie. The rent reserved on the lease in question was the best improved yearly rent that could be reasonably gotten for the lands in question at the time the lease was granted. No fine or other thing was taken for granting it. The lessee is not made dispunishable of waste. The lease contains a clause of re-entry for non-payment of the reserved rent. And the lessee executed a counterpart of the lease. The defendant on the 29th of *March 1798*, (the day of the date of the lease in question,) held the premises as tenant from year to year, to *George Allan* the elder, as he had been to the testatrix, and to *James Allan* the elder, in their respective lifetimes; and which tenancy, according to the custom of the country above stated, would determine on the 13th of *February*, the 5th of *April*, and the 12th of *May*, in the year 1798; and the defendant was in possession of the premises at the time of bringing the ejectment. The questions for the opinion of the Court were, 1st, Whether the lease of the 29th of *March 1798*, by the then tenant for life *George Allan* the elder, were a good and sufficient lease *in possession* under the power of leasing contained in *Mrs. Anne Allan's* will, so as to bind those in remainder claiming under the same will? 2d,

Whether, under the circumstances, the lessors of the plaintiff, or any of them, were entitled to recover in this ejectment?

This case was first argued in *Hilary* term last, by *W. Walton* for the plaintiff, and *Limbe* for the defendant: and again in this term, by *Erskine* for the plaintiff, and *Park* for the defendant.

For the plaintiff it was contended, that this was a lease *in reversion*, and not *in possession*, and therefore void under the power. It was only a lease in possession as to the tillage ground, which was to be holden from the 13th of *February* preceding the 29th of *March*, when the lease was executed. As to all the rest, part of which was to be taken from the 5th of *April*, and the residue from the 12th of *May* then next ensuing, it was clearly prospective, and therefore a lease in reversion. Then the lease being entire, if void for part must be void for the whole. It was said by *Holt, C. J.* in *Winter v. Lovedore*; 2 Salk. 537. Com. Rep. 39. 1 Ld. Raym. 267. S. C. that any lease to commence *in futuro* was a lease in reversion, as opposed to a lease in possession; and that a lease to commence after another lease was properly a lease in reversion. The previous occupation of the farm by the same tenant cannot make any difference: the question is the same upon the construction of the subsisting lease as if it had been made to a stranger: and if so, it is certain that he could not have taken possession of two-thirds of the farm at the time of the lease granted. A notice to quit on the 29th *March*, if given to a prior tenant under such a lease would not have been binding. Then if the lease conveying in the terms of it a reversionary interest be void under the power to lease in possession, it cannot be made good by any consideration of the custom of the country. All powers must be strictly executed according to the form prescribed; and there is no equity allowed in construing the execution of them. *Taylor v. Horde*, 1 Burr. 120; *Earl of Darlington v. Pulteney*, Cowp. 267, and *Denn v. Fearnside*, 1 Wils. 176. This rule was not shaken in *Pugh v. Duke of Leeds*, Cowp. 714, though the application of it in the last-mentioned case might be questioned. The reversioner has a right to insist that he shall not be injured: but if the tenant for life had died immediately after executing this lease on the 29th of *March*, the first quarter's rent would not have been payable till the 10th *July*, ten days after the expiration of the quarter. A lease consistent with the power and with the custom of the country might have been granted if it had not been executed till the 12th of *May*.

For the defendant it was urged that the true question was, What the testatrix, who created the power, intended? which was to be collected from the whole of the instrument, and from all the circumstances to which it related: amongst others, it must be taken that she knew the custom of the country as to the course of husbandry and the manner of leasing; and she could not intend that the objects of her bounty should be restricted from leasing in so beneficial a manner as others, and as she herself had done. The expedient proposed of waiting till the 12th of *May* before the lease was granted would not have solved the difficulty; for as great expences must be incurred by the incoming tenant in preparing the arable land for the crop, no tenant would incur such expences before-hand at the risk of not having the lease afterwards granted to him. In *Doe d. Dagget v. Snowdon*, 2 Blackst. Rep. 1224, the custom of the country was holden to control the general rule of law, as to giving six months notice to quit before the end of the tenant's year. There, as here, the arable part of the farm was holden from *Old Candlemas-day*; yet the rent being made payable at *Old Lady-day*, a notice to quit six months before the latter was holden sufficient; the whole being considered according to the custom of the country as a *Lady-day* taking. So this may be taken to be a substantial execution of the power according to the custom of the country; the whole rent being reserved quarterly. These powers are now construed more liberally than formerly. In *Pugh v. The Duke of Leeds*, Cowp.

714, where the power was to lease in possession, it was ruled that a lease *from the day of the date* should take effect either inclusively or exclusively of that day, according as it would best effectuate the intention of the person creating the power. Upon the same principle, in *Goodtitle v. Furuncan*, Dougl. 565, a lease *per verba de presenti* was holden to be within a like power: though at the time of the execution other lessees at will or from year to year were in possession of the demised premises; they receiving directions to pay the rents to the new lessee. So *Pomeroy v. Partington*, 3 Term Rep. 665, and *Doe d. Duke of Devonshire v. Cavendish*(a), turned entirely on the intention of the parties making the powers. At any rate, the execution of a power may be good in part, so far as it is warranted by the power, though bad for the excess; as in *Alexander v. Alexander*, 2 Ves. 644, and *Commons v. Marshall*, 7 Bro. P. C. 111: therefore the lease may be valid for the arable land.

In reply, it was answered, that this was no question of an excess in executing the power, for that the lease was entire, and the rent, which was also entire, could not be apportioned; and therefore, the whole was a void execution of the power. That the case of *Doe v. Snowdon* turned upon the construction of a notice to quit given to a tenant from year to year, which not being upon a contract under seal, might be governed by the custom of the country, in relation to which the parties might be supposed to have contracted: for which purpose the entry on the arable land was not considered as a general taking possession of it at that period, but only for a special purpose, viz. to plough and prepare for the *Lent* corn. But even that case was much questioned by Lord *Kenyon*, C. J. in an ejectment tried before him at *Stafford* summer assizes 1788, upon the demise of Lord *Grey de Wilton*(b).

Curia adv. vult.

GROSE, J. now delivered the opinion of the Court.—In this case, there can be no doubt that the lease granted to the defendant is a lease *in reversion*, inasmuch as it is dated the 29th of *March*, and is to take effect as to all the lands and other premises contained in it, except the arable, at times subsequent to the determination of an existing interest: and according to the definition in the case of *Winter v. Loveday*, Comyns, 39, leases in reversion in a power mean leases to commence after the end of a present interest in being. But it is argued for the defendant, that Mrs. *Allan*, the creator of the power in this case, must have intended, from the custom of the country, of which she was apprised, that such leases should be made as that in question. To this it may be said in answer, that it would be directly contrary to the terms of the power; which, if the custom be engrafted on it, instead of being to let leases in possession, would be to let leases in reversion, so as the commencement of the lease as to part should be carried not beyond the 5th of *April*, and as to other part, not beyond the 12th of *May* next following the lease. The whole of the argument for a construction in favour of the defendant is built on a supposed impossibility, that the power of leasing given by this will should be exercised, if this lease be not good. But in answer to this it may be observed, first, that in this particular case no such impossibility exists; for the defendant might have surrendered his subsisting term and taken a new lease in possession. And though the lease had been granted to a person not having a prior interest to be surrendered, still it might have been made consistent with the terms of the power. For if the case of *Doe v. Snowdon*, 2 Blac. Rep. 1224, be law, the interest of the tenant was that of a tenancy from year to year, ending the day on which the rent is payable in *April*, under an agreement to let the succeeding tenant prepare the arable land for corn in the month of *February*; and having under the same

(a) 4 Term Rep. 741. n. Of this case *Lawrence*, J. now observed, that it was one that would not rule any other, at least not exactly similar: That he had heard Lord *Kenyon* express that opinion of it. And vide *Brudenell v. Elwes*, ante, 1 vol. 450.

(b) Vide this case afterwards stated by *Grose*, J. in delivering the judgment of the Court.

agreement a right to depasture the meadow till the 12th of *May*; under which circumstances a lease in possession might have been made, had the tenant for life waited till the 5th of *April*. The case of *Doe on the demise of Lord Grey de Wilton*, at *Stafford* summer assizes 1788, was cited at the bar as a case in which *Doe v. Snowdon* had been over-ruled by Lord *Kenyon* at *nisi prius*. That was an ejectment brought, by a landlord on a notice to quit. The defendant held a farm, as to the arable lands from *Candlemas*, as to the buildings and pastures from *May-day*; the rent payable at *Michaelmas* and *Lady-day*. The notice to quit was given six months before *May-day*, but not six months before *Candlemas*. Lord *Kenyon* nonsuited the plaintiff; and is stated to have said, that the notice must be given half a year before *Candlemas*. But it does not appear whether the notice to quit were given half a year before *Lady-day* or not, so as to bring it within the rule laid down in *Doe v. Snowdon*. But it does not appear to us necessary, in deciding the present case, to determine between the cases of *Doe v. Snowdon* and that of *Doe d. Lord Grey De Wilton*; because, supposing half a year's notice to quit previous to the earliest time of entering on any of the lands to be requisite, in order to maintain an ejectment; it will not necessarily follow, that a lease made previous to the last rent-day of the subsisting lease, and also previous to the time of possession being to be obtained of a great part of the farm, will not be a lease in reversion. But be that as it may, at all events a concurrent lease might have been granted according to the case of *Goodtitle v. Fumucan*, Dougl. 565, for twelve years immediately commencing, *habendum* from the 13th *February*, the 5th *April*, and the 12th of *May* in the preceding year; this would have fallen within the terms of the power, which is to demise or lease for any term or number of years not exceeding twelve years, in possession, and not in reversion: for such lease would have been in possession, and not in reversion, remainder, or expectancy, and would have been for a term not exceeding twelve years: which is the restriction mentioned in the power. And it is not to be taken that this would not be an execution of the power to the utmost extent Mrs. *Allan* intended; for if a lease may be made not contradictory to the terms of the power, and consistent with the custom of the country, such lease shall be intended to be what was meant (if by a surrender a lease in possession, conveying a future interest for twelve years, could not be granted), rather than a lease contrary to the words of the power. The cases cited, where the leases have been holden void for excess only, do not apply; for this is no question of excess: in those cases, by retrenching the excess a lease may be brought within the terms of the power; but no limitation of the term will make a lease in reversion a lease in possession.

Postea to the Plaintiff.

Nantes v. Thompson.

2 East, 385. May 31, 1802.

A declaration on a policy of insurance on a foreign ship need not aver any interest in the assured; though there be no such words as "interest or no interest" in the policy.

THIS was an action on a policy of insurance, declared to be made by the plaintiff as well in his own name as for and in the name and names of all and every other person or persons to whom the same did, mi, h., or should appertain in part or in all, on the ship *Hoop*, valued at 1460*l*. and goods on board, lost or not lost, at and from *Elsineur* to *Ferrol*, *Cadiz*, and *Carthagena*, warranted to depart with convoy for the voyage, &c. The policy was in the usual form; and the declaration contained these, together with other usual averments: That the plaintiff was the person who gave the order to the agent

immediately employed to effect the policy; that the said ship *Hoop* was not at the time of effecting the policy, nor of the happening of the loss after-mentioned, nor at any other time, *the property of or belonging to the King or any of his subjects*; and that in the course of her voyage, she arrived and anchored in *Plymouth Sound*, and was there arrested and detained by order of his Majesty, and thereby prevented from pursuing her intended voyage, and was afterwards condemned as lawful prize in the High Court of Admiralty, whereby the same ship became wholly lost to the plaintiff, and to every other person to whom the same did or might appertain. There was a second count with the same averments, only stating that the vessel in the course of her voyage was taken as prize by persons unknown. There were also the common money counts. To the first and second counts there was a demurrer, alleging for causes that it was not alleged, nor did therein appear, for whose use or benefit, or on whose account the policy was made; nor to whom the said ship appertained in part, or in all; *nor what person or persons were interested or concerned in the said insurance, &c.*; nor that the plaintiff, or any other person or persons *had any interest, property, or concern in the ship*; and also, for that it is alleged that the said ship became wholly lost to the plaintiff and to every other person to whom the same did or might appertain in part or in all; but it was not alleged, nor did appear with sufficient certainty, to whom or to what other person or persons besides the plaintiff the said ship became wholly lost, &c. Joinder in demurrer.

This case was first argued in *Easter* term last, by *Giles* in support of the demurrer, and *Puller*, contra; and again in this term, by *Erskine* for the demurrer, and *Park*, contra. It is unnecessary to enter at length into the argument, or the authorities referred to, as they were so fully considered by the Court in giving judgment.

In support of the causes of demurrer assigned: though it was not denied that even if the plaintiff had had no interest in the subject matter, it would have been competent to him, as agent for a foreigner, to have effected the policy, notwithstanding the general provision of the stat. 19 Geo. 2. c. 37, which is confined to insurances on ships, &c. belonging to the king or any of his subjects; and that it would also have been competent to him to have laid a wager on the event of the ship's safe arrival without any interest in the property; yet it was contended, that a policy of insurance, in the very terms as well as principle of it, if not otherwise expressed, imported a contract of indemnity, and therefore necessarily supposed an interest in the party for whose benefit it was made: for he could not be *assured* unless he had some interest at stake, and such upon which the perils insured against might operate. Then if that were the understanding of the parties to the contract, such interest ought to be averred. That it was a deception upon the underwriter if the assured had no interest, because it varied the risk very materially: for if it were known before hand to an underwriter that he was contracting a mere wager with the party, he would necessarily require a higher premium; because every loss in that event must be a total loss, as there could be no abandonment, and he could have no benefit of salvage, which in the case of a genuine marine insurance diminished the risk. Besides which, in the case of a mere wager, the assured so far from having any interest in the preservation of the ship, in its efficiency to perform the voyage, or in the ability or integrity of those employed in the navigation; for ascertaining all which the underwriter gives him credit, that he is rather interested in insuring the most desperate risks; against which the underwriter ought to have due warning, that he may apportion the premium accordingly.

On the other hand, it was denied that contracts of insurance were always to be considered as contracts of indemnity: for that a wager policy was recognised to be lawful before the stat. 19 Geo. 2. c. 37., and was admitted to be so still with regard to foreigners. And that if wagers in general were

lawful, though the parties had no interest in the event, there was no reason why they should not be made in the form of a policy as well as in any other form, unless restrained by some positive law. As to the risk being altered, it was competent to the underwriter in every case, and an essential part of his business, to make inquiry as to every circumstance which could operate on the extent of the risk. That if the policy had been made "interest or no interest," or with words to that effect (which it was admitted would have been sufficient,) no more intelligence would have been conveyed to the underwriter on the face of the policy than here; and no injury could ensue to him from the omission of the averment of interest contended for: because if the policy imported an interest, the plaintiff would be bound to prove one at the trial, whether expressly averred or not; and if it did not so import, then such averment was not necessary: neither did the stat. 19 Geo. 2, impose any restraint in declaring on policies on foreign ships. They also referred to many precedents of declarations before the statute: and insisted that this very point was determined in *Crawford v. Hunter*(a), where the fourth count of the declaration was the same as the present; and no writ of error was brought.

In reply, it was observed, that in *Crawford v. Hunter* an interest was averred in the first count; and the principal question being, Whether the plaintiff had an insurable interest, it was not thought worth while to prosecute a writ of error in that particular action merely for the defect of the fourth count: but in *Crawford v. Lusignan*, on the same policy, (where a writ of error was brought,) the plaintiff only took his judgment on the counts averring an interest.

Curia adv. vult.

GROSE, J.(b) now delivered the opinion of the Court.—The question in this case is, Whether in a declaration on a policy, which on the face of it has no words to shew it not to be an interest policy, if it be required that the plaintiff should aver an interest to be entitled to recover? In the course of the argument, it was admitted that the vessel, being foreign, was the subject of insurance, whether the assured had an interest in it or not: and it does not seem that an underwriter is likely to suffer any inconvenience from that not being expressed in the policy; inasmuch as at the time of the subscription, he may be informed, whether the ship be or be not a foreign vessel; and whether the assured have an interest or not: and if he have such interest, the underwriter will be entitled to all the advantages arising therefrom, according to the case of *Le Pyper v. Farr*, 2 Vern. 716, whatever may be the form of the policy. The argument for the defendant turns upon a criticism on the word *assured*, and upon confining that word to its original and proper meaning, and not allowing it to be understood in a looser and less proper sense, which it has acquired. That the word *assured* may be understood to import a contract to pay a certain sum on the happening of the events specified in a policy, without any regard to interest, seems to follow from what was not denied by the defendant's counsel, viz. That the plaintiff might have recovered, had the policy used the words "interest or no interest;" in which case, unless a sense be given to the word *assured* different from its proper meaning, there would be a contradiction in terms; for it would be a contract to indemnify a man against risks, by which, on the face of the instrument, it would appear he could not be damaged: and to make such contract intelligible, the words "*interest or no interest*" must be understood as pointing out that the word *assured* was not to be understood in its original and proper sense. In making the stat. 19 Geo. 2, the legislature must have understood that the word *assured* had an improper as well as a proper meaning, by its prohibiting *assurances* "interest or no interest," which

(a) 8 Term Rep. 13, where all the cases on the subject are collected.

(b) Lord Ellenborough, having been concerned in the cause, gave no opinion.

is a very different thing from an insurance, "without further proof of interest than the policy," which is also mentioned in the statute: for the latter is an admission of interest to the amount of the policy, and is consistent with the proper sense of the word *assured*; and not like an assurance without interest, which in the strict sense would be a contradiction in terms. The stat. 14 Geo. 3. c. 48, also treats the word *insurance* as having this less proper sense. Its title is "an act for regulating insurances on lives, any for prohibiting such insurances, except in cases where persons insuring shall have an interest in the life or death of the person insured:" and its preamble recites, that the making *insurances on lives*, or other events, *wherein the insured shall have no interest*, hath introduced a mischievous kind of gaming; and then the statute enacts, that no *insurance* shall be made on any event wherein the person on whose account such policies shall be made shall have no interest. Here the legislature treats *insurance* as a thing which may exist without an interest: but if, according to the defendant's argument, that could not be, the act should have been against wagering under the form or pretence of insuring; and should have enacted, that no agreement of the parties to dispense with the proof of interest, or admission of interest, if it could be shewn not to exist, should enable the persons so contracting to recover. In *Roebuck v. Ham-merton*, Cowper, 737, a wager was laid on the sex of the Chevalier *D'Eon*; and the form of the contract was this: in consideration of thirty-five guineas for 100*l.* received of Messrs. *Roebuck* and *Vaughan*, we whose names are hereunto subscribed, do severally promise to pay the sums of money which we have hereunto subscribed, on the following condition, viz, in case the Chevalier *D'Eon* should hereafter prove to be a female. Valued at the sum insured, without further proof of interest than this policy. In witness whereof, we the assurers have subscribed our names. And it was contended, that the stat. 14 Geo. 3. c. 48, did not extend to that case: that it was no policy: that the subject-matter was not capable of insurance: that the nature of the act, and not the form of the instrument, ought to decide: and that it was a mere wager reduced into writing. But the Court held it within the act as a *policy of insurance*. If then the insurance in the case before us may be taken to be an insurance without interest, and to be understood as an agreement to pay the sum subscribed in the event of the ship being lost by any of the perils insured against, the non-averment of interest can at most lead only to a conclusion, that this is not an interest policy: supposing if it were an interest policy, an averment of interest to be necessary: and the plaintiff will be entitled to recover, as the assurer of a foreign ship having no interest in it. But if it be an interest policy, the precedents referred to are, we think, authorities for declaring without an averment of such interest. The case of *Goring v. Sweeting*, in Saunders, 200, was a policy valued at 300*l.*, without further account of the same: the effect of which was to make it unnecessary to prove the amount of the interest at the trial. But that could not, according to any rule of pleading, dispense with the necessity of averring an interest, if without such averment there could be no breach of the defendant's undertaking; which is the objection in the present case. Nor could the allegation of an offer to abandon supply the want of the averment; for that was an allegation perfectly immaterial; it need not have been proved to have entitled the plaintiff to recover an average loss; and a total loss might have been recovered without it. And though the plaintiff offered to abandon such interest as he had; yet inasmuch as it would not follow from thence that he had any interest, it could not supply the want of an allegation; which, according to the argument in this case, is most material and essential, to shew a breach of the defendant's contract; for want of which a verdict would hardly have helped; for such allegation would have been proved by proof of a paper delivered to the defendant, couched in the terms of that allegation, without any proof whatever of interest. It may be inferred from the offer to abandon in that case, that it was a

policy on interest; notwithstanding which no objection was taken to the want of the averment, now insisted on, by *Saunders*, who, for acuteness and knowledge of pleading, was exceeded by no one, and who appears dissatisfied with the determination against him. It is therefore as a precedent, a very strong authority in favour of the plaintiff. *Vidian 26*, is another declaration on a similar policy on the same ship, at the suit of another plaintiff, in the same form. *Vidian 48*, is an insurance on the ship *and goods*: and the averment is, that the plaintiff was possessed of part of the ship on a certain day, and that afterwards divers goods were loaded on board her, with which she sailed, and that those goods were exchanged for others, and that the ship was taken with those last-mentioned goods: but it contains no averment that those goods were the plaintiff's, or that he loaded them, or that he had any interest in them; one or other of which allegations, according to the argument for the defendant, was necessary to shew that the plaintiff was damaged by the loss of the goods, and to entitle him to recover for them. *Clift. 77*, was admitted to be a precedent in favour of the plaintiff. As to *Jeffrys v. Legendra*, that precedent does not support the plaintiff's case; for upon examining the roll, it appears that an interest is averred in the declaration, and found by the special verdict. Subsequent to the stat. 19 Geo. 2, we do not find any instance where, in cases within that statute, an interest has not been averred; which, from its universality, compared with the instances before the statute where it has not been done, affords some inference, that without such averment, a policy made in the form this is, is not necessarily to be taken to be an interest policy; and we are not apprised of any case since that time, except *Crawford v. Hunter*, where the policy could be made without interest, in which, by the terms of the policy, the assured might not aver an interest, without subjecting himself to a greater degree of proof than if he had omitted it. Such was the case of *Thelluson v. Fletcher*, Dougl. 301, which was a policy on foreign ships: in that case there was an averment of interest; but as the policy was to be sufficient proof of interest, that averment would be proved without going a step further than would have been necessary, had there been no such averment: and therefore, such precedents have little weight in determining the question. In *Crawford v. Hunter*, the fourth count of the declaration was in the form used in this case, and was holden good on demurrer. Whatever therefore might have been our opinion, if we were now called upon to put a construction for the first time on this instrument, considered perhaps in its most proper signification as a contract of indemnity; yet after the precedents I have alluded to, and the late decision on demurrer, until that judgment, if it be wrong, shall be corrected in a court of error, we think its authority should rule similar cases. And if the underwriters apprehend any inconvenience from the assured being entitled to recover on a policy without averring an interest, which does not by the terms of it profess to be without interest, they may easily obviate such inconvenience by adding to the policy the words "on interest." We are therefore of opinion, that in the present case judgment must be given for the plaintiff. And I will add, that Lord *Kenyon*, who was present at the first argument of this case, was strongly of the same opinion (1)(2).

Judgment for the Plaintiff.

(1) Vide *Clendinning & al. v. Church*, 8 Caines, 141.

(2) [See upon this point 2 Phill. on Ins. (2d edit.) p. 620 to 625.—W]

Cooke and Others, Executors, &c. v. Lucas.

2 East, 395. May 31, 1802.

Where the plaintiffs sued as executors in covenant against the lessor of their testator, for not providing timber for the repair of the demised premises, upon a demand made by the plaintiffs after the death of their testator; held that they were not liable to pay the costs of a judgment as in case of a non-suit, inasmuch as though the breach happened in their own time, they could only declare as executors upon the contract made with their testator.

THE plaintiffs declared in covenant as executors of J. C. against the defendant as assignee of S. L. deceased, upon an indenture executed by the testator and S. L. whereby the latter leased to the former a messuage, malt-house, and certain closes of land for 21 years, at a certain rent, and wherein the testator covenanted for himself, his executors, &c. to keep the premises in repair during the term, and the said S. L. covenanted to provide the testator, his executors, &c. with sufficient timber, &c. for that purpose. The declaration further alleged the entry and possession of the testator, the estate of S. L. in the reversion vesting in the defendant by assignment, the subsequent death of the testator (having first made his will and appointed the plaintiffs his executors), and that on his death the plaintiffs proved the will, &c. by virtue whereof they afterwards entered into the said demised premises, and became and still were possessed thereof for the residue of the term; and that after they so became possessed, &c. and after the reversion vested in the defendant, the said messuage, &c. requiring repairs of timber, &c. they gave notice to the defendant to provide the same for the repairs, and were willing to have repaired the premises, but that the defendant would not provide them with sufficient timber, &c. but neglected and refused so to do, contrary to the said indenture and covenant, &c. To the damage, &c. concluding with a profert of the letters testamentary. Plea, *non est factum*.

After judgment as in case of a nonsuit pursuant to the statute^(a); the Master having declined taxing the defendant his costs of nonsuit, upon the ground that the plaintiffs as executors were not liable;

Abbott and Hovell, on a former day, moved that the Master might be directed to tax the defendant his costs. They referred to *Goldthwayte et Uxor, Executrix v. Petrie*, 6 Term Rep. 234, where the general rule was taken to be, that if the cause of action arise after the testator's death, the executor failing shall pay costs. There money of the testator was received by the defendant in the time of the executrix; and after a verdict for the defendant in an action for money had and received he was holden entitled to his costs: and yet the effects, if recovered, would have been assets in the hands of the executrix. So in *Bollard v. Spencer*, 7 Term Rep. 358, in trover, where the conversion was in the time of the administratrix. But in *Wilton v. Hamilton*, 1 Bos. & Pull. 445, where an executrix sued upon a policy made to the testator, for a loss happening in his time, she was holden to be exempt from the costs of a nonsuit; because, as *Eyre*, C. J. said, she could only bring the action in right of her testator. The only case which seems to carry the exemption further is *Tattersall v. Groote*, 2 Bos. & Pull. 253: there indeed the administratrix, who declared in covenant, assigned a breach subsequent to the death of her intestate, and yet was holden not liable to the costs of a judgment against her on demurrer. But that, as appears by a former part of the same book, 1 Bos. & Pull. 131. S. C. on another point, was an action

(a) The question of costs was considered in the argument to be the same in this case as if it had arisen on a nonsuit. See *vide* 4 Burr. 1228. *Vide Howard, Executor, v. Radburn, Barnes*, 130.

of covenant on an indenture of partnership between the defendant and the intestate, wherein it was agreed on a dissolution of the partnership to submit all matters in difference relating thereto to arbitration, and the breach assigned was the non-appointment of an arbitrator by the defendant after the intestate's death. The ground of that determination was, that the plaintiff could not have sued in any other right than by naming herself administratrix, and shewing the covenant made by the intestate and the defendant. But here the plaintiffs might have declared as assignees of the termor, which they are in law; in the same manner as one who is in as heir may sue as assignee of his ancestor upon a covenant running with the land. *Derisley v. Custance*, 4 Term Rep. 75.

Gaselee, contra, shewed cause in the first instance, and relied principally on *Tattersall v. Groote*, where all the cases were collected and considered, and which established the principle, that if the executor can only sue upon the special contract made with the testator, he is not liable to costs if he fail. That he contended was the case here: and that the plaintiffs could not declare as assignees, because they could not be such in their own right, at least till all the testator's debts were paid: neither would it have been sufficient for them so to have declared in this case; for though that may be sometimes done, as against a defendant in possession, to charge him, the plaintiff not knowing by what title such possession may be claimed: yet a plaintiff must always be taken to be cognizant of his own title, and is bound to shew it in these cases: here then the plaintiffs were bound to declare as executors, and to make a profert of the letters testamentary; and therefore the stat. 23 H. 8. c. 15, which gives costs to a defendant on a nonsuit, being confined to actions of covenant on contracts made *with the plaintiffs*, does not apply.

Curia adv. vult.

GROSE, J. now delivered the opinion of the court. (Lord *Ellenborough*, C. J. having been absent when the case was argued). This was an application for the master to tax the defendant his costs on judgment as in case of a nonsuit, in an action of covenant brought by the plaintiffs, as executors of *Simon Cook*, against the defendant, on his covenant to furnish materials for the reparation of certain premises demised by the defendant: and the breach of covenant assigned is in not furnishing the plaintiffs, the executors of the lessee, with those materials, on a demand made subsequent to the lessee's death. This case was attempted to be distinguished from that of *Tattersall v. Groote*, 2 Bos. & Pull. 255, which is the last case on the subject, and in which all the prior cases are considered; by saying, that in this case the plaintiffs might have declared as assignees of the demised premises; and that as it was not necessary to style themselves executors, they shall not by so doing protect themselves from the payment of costs. But we do not think that distinction is supported by the cases on which the argument of the defendant's counsel is founded; for they are cases in which the plaintiffs did in no respect entitle themselves to maintain their actions in consequence of their representative character; but would have been entitled to recover had that description of themselves been omitted in the declaration; and though they had made no profert of any probate or letters of administration: but if those matters had been omitted here, the plaintiff's declaration would have been demurrable: but with those circumstances they shew on the face of the pleading a perfect right to maintain this action, as the personal representatives of the lessee, for a breach of a contract made with their testator, and not with themselves. We, therefore, are of opinion that this case falls within the rule of *Tattersall v. Groote*; and that the Master did right in not taxing the defendant his costs (1).

(1) *Vide Hollis v. Smith*, 10 East, 294, and the editor's note thereto.

Moss and Others, Assignees of Kirkpatrick, a Bankrupt, v. Charnock.

2 East, 399. May 31, 1802.

If a trader become a bankrupt between the time of executing a bill of sale of a ship at sea to the defendant, and the time of the defendant's complying with the requisites of the registry acts of the 26 Geo. 3. c. 60, and 34 G. 3. c. 68. s. 16, though such requisites were completed after the act of bankruptcy, and before the action brought, the property does not pass, but the assignees of the bankrupt may recover the possession of such ship in trover.

IN trover for the ship *Mary Ann*, it appeared in evidence at the trial, at the sittings at *Guildhall* before *Le Blanc, J.* that the bankrupt residing at *Liverpool*, being greatly indebted to the defendant before his bankruptcy, and being possessed of two third-parts of the ship in question, on the 23d of *August* 1800, executed a bill of sale of the same, (the ship being then at sea,) to the defendant, who was resident in *London*, as a security for the debt then due, and for further advances, and transmitted the same to him, with a letter dated the 27th of the same month, in which he requested the defendant to hold the assignment till he (*Kirkpatrick*) might want it. The defendant wrote in answer, on the 12th *September*, that he had examined the assignment, which he thought was no security to him at all, being void of the regular forms prescribed by the act of parliament (meaning the registry act after mentioned); and therefore, that he should return it to *Kirkpatrick*. The instrument, however, was not returned. But the bankrupt having communicated with the attorney who had prepared it, and obtained advice from him what further steps were proper to be taken by the defendant in order to perfect his title to the ship, by pursuing the requisitions of the registry act, in the instance of a vessel at sea, wrote to the defendant to advise him of the same: in answer to which, the defendant, by letter dated 19th *September*, observed that the explanation respecting the security on the ship had not at all relieved his mind on the subject. And again by letter of the 12th *November* 1800, the defendant wrote to *Kirkpatrick*, that as the *Mary Ann* had sailed from *Hamburg*, he supposed that *Kirkpatrick* had taken care to get her insured; adding, that if he wished to have the assignment back again, which he (*Kirkpatrick*) had made to him (the defendant), he would send it, or deliver it over to whom *Kirkpatrick* pleased. And it was not till the 15th of *November* that the defendant consented to accept of the assignment, threatening the bankrupt at the same time with legal process in order to compel a further security for his demand. On the 19th of *November*, *Kirkpatrick* committed an act of bankruptcy. It further appeared, that the bankrupt, when he executed and transmitted the assignment of his two third-shares in the ship to the defendant, did not deliver up possession of the original bill of sale of the same shares to himself, but the same continued in his custody till after the bankruptcy when it was found in his chest by the assignees under the commission. The ship was at sea, or in the river *Humber*, in the course of her voyage outwards to *Hamburg* and *Norway*, when the assignment was executed and delivered to the defendant, and did not return to the port of *Liverpool*, where she was registered, till the 7th of *March* 1801. None of the requisites of the registry acts 26 Geo. 3. c. 60, and 34 Geo. 3. c. 68, s. 16, made necessary in the case of a transfer of property in a ship at sea, were complied with by the defendant until the 5th of *December* 1800, when all that could then be done were performed, and the remainder on the arrival of the ship in port.

It was insisted at the trial, that the bankruptcy having intervened between the original assignment by the bankrupt to the defendant, and the 5th of *December*, when the requisites of the registry acts were complied with, no pro-

perty passed from the bankrupt prior to the period when by law he was divested of the power of transferring it; and *Le Blanc*, J. being of that opinion, directed the jury accordingly, who found a verdict for the plaintiffs.

A rule *nisi* was obtained in *Easter* term last for setting aside the verdict and having a new trial; against which *Park*, *Holroyd*, and *Littledale*, shewed cause in this term; and *Erskine*, *Gibbs*, and *Giles*, were heard in support of it. It is unnecessary to detail the arguments, as they are particularly noticed in the judgment of the Court.

The Court took time to consider the case; and now

LAWRENCE, J. delivered the opinion of *Le Blanc*, J. and himself; observing first, that if they had had any doubt they would have had the case argued again, as Mr. Justice *Grose* was not present in court when it was argued.—This was an action of trover for a ship, brought by the plaintiffs, assignees of *Kirkpatrick* a bankrupt, against the defendant, who claimed two third-parts of it as the vendee of *Kirkpatrick* before his bankruptcy. The facts of the case are shortly these: *Kirkpatrick*, being indebted to the defendant in more than the value of his share of the ship, in *August* made a bill of sale thereof to the defendant, and sent it to him; but the defendant declined accepting it till the 15th of *November* 1800; and on the 19th, *Kirkpatrick* became a bankrupt. On the 5th of *December*, and not before, the requisites of the stat. 34 Geo. 3. c. 68. s. 16, in respect of the transfer of ships not in port were complied with; and within ten days after the return of the ship to port, an indorsement was regularly made on the certificate of the registry, and the other requisites of the act complied with; but at the time of the bankruptcy, the bill of sale of two thirds of the ship from *Swainstone* and *Crookendale*, the former owners, remained in the possession of *Kirkpatrick*. The jury having found for the plaintiffs, and a new trial having been moved for, it has been resisted on two grounds; first, that the plaintiffs are entitled to recover, under the stat. 21 Jac. 1. c. 19, because the bill of sale from *Swainstone* and *Crookendale* remained with *Kirkpatrick*. Secondly, because the requisites of the stat. 34 Geo. 3. c. 68, not having been complied with before the bankruptcy, the sale was not complete at that time. In answer to which it has been said by the defendant's counsel, that since the stat. 26 Geo. 3. c. 60, and 34 Geo. 3. c. 68. s. 16, which provide for a notorious transfer of property in ships, the non-delivery of the grand bill of sale will not vitiate the transfer of a ship, as that can be no longer any badge of fraud. And as to the last objection; that as the requisites of the stat. 34 Geo. 3, were complied with within a *reasonable* time after the execution of the instrument of sale, that will by relation make the sale complete from the 15th of *November*, a time before the bankruptcy. As my brother *Le Blanc* and myself are of opinion with the plaintiffs on the second objection, it is not necessary for us to say any thing on the first; but thus much may be observed, that if we look at the prevention of fraud, the necessity of the quickest compliance with the requisites of the stat. 34 Geo. 3, is obvious; for if they were delayed, and the grand bill of sale or other muniment might remain with the vendor, a door would be opened to the greatest frauds, from the reliance men would place on the possession of such bill of sale, when no evidence of any transfer from the possessor could be found on searching the registry.

As to the second objection; one of the great objects of the stats. 26 & 34 Geo. 3, was to prevent foreigners being concerned in *British* ships, without being subject to the disadvantages belonging to that character: and [as the most effectual means of coming at an immediate knowledge of such transfer] has made the validity of the transfer of every ship or vessel, with a very few exceptions, depend upon the compliance with certain circumstances which must convey to the public the fullest information on that subject. The words of the stat. 34 Geo. 3. c. 68. s. 16, as they respect the case before us, are: "that if any ship or vessel shall be absent from the port to which she belongs

when any alteration in the property thereof shall be made, so that an indorsement or certificate cannot be *immediately* made, a copy of the bill of sale shall be delivered [to the person authorized to make registry, who is to do certain things directed by the act], and within ten days after such ship or vessel shall return to the port to which she belongs, an indorsement shall be made, and a copy of it delivered in manner before mentioned; *otherwise* such bill of sale, or contract or agreement for sale, shall be *utterly null and void to all intents and purposes whatsoever*." Such being the words of the act, the public will be most effectually served by holding, that no interest shall pass from any owner in *British* ships to any other, until the public has that information which is so essential to its commercial welfare: and the objects of the parties to such contract will be best consulted by allowing the longest time to comply with the requisites of the act, so as that, which was meant to operate as a certain means of compelling men to give that information, be not destroyed or weakened. And this will be done by construing the statute as enacting, that no bill of sale or other such instrument shall have any operation or effect, until the requisites imposed on the parties to the sale are complied with; and by not allowing any relation to hold good, so as to make the conveyance effectual from any antecedent time. By such construction the parties to the contract will be most strongly called on to comply immediately with the requisites of the act; which not only from its general scope, but from the words of it, it is evident were intended to be done without delay. And the purchaser will not lose the benefit of his contract, if at any time he comply with the requisites before the rights of others intervene. But if this act were to be considered as giving an indefinite time for the compliance with its requisites, it would enable a transfer of property to be made to foreigners, who might remain concealed owners until the return of the vessel to her port, which might not be for a great length of time. Or if the act is to be understood as allowing a certain reasonable time for complying with the requisites after the execution of the bill or other contract of sale, and by any inadvertence that time should be exceeded, [as to the extent of which there may be very different opinions,] the consequence would be, that the sale would be forever null and void, however great the damage might be to the purchaser.

This case has been compared to the cases of enrolments of bargains and sales under the statute 27 H. 8.; according to the construction of which statute, if the deeds be enrolled within the six months the estate will pass. But the words of the two statutes are very different; the statute of H. 8. enacts, that no manors, lands, &c. shall pass or change, where any estate of freehold shall be made by any bargain and sale; *except* the same be by writing indented, sealed, and enrolled within six months next after the date of the indenture. But the statute of Geo. 3, on the construction of which we are now deciding, enacts certain things to be done, otherwise the bill of sale shall be utterly null and void to all intents and purposes: which words are most materially different from those in the statute of enrolment. And we are not aware of any authority to shew, that if a statute direct certain things to be done to give effect to an instrument, without limiting a time for doing it, that such statute is to be construed as if it had said, that it shall be sufficient if the thing be done within a *reasonable* time; instead of understanding the statute as enacting, that the instrument shall have no operation or effect until what the statute requires shall have been complied with. For these reasons, my brother *Le Blanc* and myself are of opinion there should not in this case be a new trial(1).

Rule discharged.

(1) Vide *Bloxam & al. v. Hubbard*, 5 East, 407. *Hayton & al. v. Jackson*, 8 East, 511.

Dimsdale v. Nielson.

2 East, 406. May 31, 1802.

In a country cause, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the court.

RULE to shew cause why interlocutory judgment, signed by the plaintiff, should not be set aside with costs for irregularity, and proceedings stayed, &c.

The defendant was arrested at *Liverpool* on the 15th of *May* instant, on a testatum special capias issued the 11th, returnable in one month from *Easter* (being *Sunday 16th May*); to which the defendant put in special bail before a commissioner at *Liverpool* on the 17th *May*, who then justified by affidavit. On the same day the plaintiff filed a declaration conditionally, and served notice thereof on the defendant at *Liverpool*, and gave him a rule to plead thereto at the same time. The bail-piece was allowed and filed with the filacer, and notice thereof, with a copy of the affidavit of the bail, was given to the plaintiff's attorney on the 20th of *May*; and on the same day the defendant filed a plea in abatement. Notice of exception to the bail was given on the 21st; in consequence of which notice of justification of the said bail by affidavit was given for the 25th, when the bail did accordingly justify in court. Notwithstanding which the plaintiff's attorney demanded a plea on the 26th, and afterwards signed judgment for want of it, and gave notice of a writ of inquiry.

Littledale, in support of the rule, observed, that by the practice, 1 Tidd. 134, the plaintiff, in a country cause, has twenty days to except to the bail, before which the defendant cannot perfect them; and therefore, if the defendant were not to be considered as sufficiently in court before the perfecting his bail, so as to be entitled to plead in abatement, defendants in the county must be altogether excluded from pleading in abatement, if the plaintiff choose to except to the bail; although it may afterwards appear that proper bail had been put in in time.

Scarlett, contra, relied on *Venn v. Calvert*, 4 Term Rep. 578, where a plea filed before the bail were perfected was holden a nullity, although they afterwards justified; and therefore the plaintiff was entitled to sign judgment as for want of a plea, the bail not having justified till after the time of pleading was out.

LORD ELLENBOROUGH, C. J. The defendant appears to me to be in court after he has put in bail, unless it turn out that the bail on exception taken are afterwards set aside. But if the bail are ultimately accepted, the defendant has done every thing which it was in his power to do, and therefore ought not to be deprived of any benefit which the law gives him.

LAWRENCE, J. observed, that in the case of *Venn v. Calvert* the plea must have been a plea in bar, pleaded after the bail had been excepted to, and it would be impossible, if the plaintiff delivered his declaration conditionally, and delayed excepting for four days, that a defendant could ever plead in abatement; as by the rules of the Court he must plead in abatement within that time(1).

Per Curiam,

Rule absolute.

(1) In a note to *Binns v. Morgan*, 11 East 412, it is said, that the same point was ruled, on the authority of this case, in *Holland v. Sladen*, M. 47 Geo. 3 B. R. which was a town cause.

CASES

IN

TRINITY TERM,

IN THE FORTY-SECOND YEAR OF THE REIGN OF GEORGE III.

Wilkey v. Thornton.

2 East, 409. June 19, 1802.

An affidavit to hold to bail for a certain sum for the breach of an agreement must shew that the sum is stipulated damages, and not merely a penalty : stating that the defendant bound himself in a certain sum to perform a certain agreement, and that he had neglected and refused to perform his part is not sufficient.

THE defendant was holden to bail on an affidavit stating that he was " indebted to the plaintiff in 50*l*. upon and by virtue of a certain agreement dated 30th November 1801, under the hands of (the parties) whereby each of them bound himself unto the other in the said sum of 50*l*. for the true performance of the said agreement ; and which agreement the said defendant hath neglected and refused to perform on his part," &c.

Reader moved that the defendant might be discharged out of custody on filing common bail, on the insufficiency of the affidavit in not stating what the agreement was, or the breach of it ; so that the Court could not know whether the 50*l*. were stipulated damages or a penalty ; for the former of which only the defendant could be holden to special bail. He cited Salk. 100. Anonym., *Whitfield v. Whitfield*, Barnes, 109, qto. *Archer v. Ellard*, Sayer 109, and *Brookes v. Friend* therein cited, *Stinton v. Hughes*, 6 Term Rep. 13, and *Hatfield v. Linguard*, Ibid. 217, and observed, that since the stat. 8 & 9 W. 3. c. 11. s. 8, the penalty was not to be considered as the debt even at law ; for execution could not be taken out for it, but the real damages must be assessed by the jury.

Espinasse shewed cause in the first instance, and contended, that the 50*l*. for which the defendant had been holden to bail appeared to be stipulated damages, and not a penal sum : and here it was stated that the agreement had been broken : which distinguished this case from *Stinton v. Hughes*.

Lord ELLENBOROUGH, C. J. The rule is clear that for stipulated damages the defendant may be holden to bail ; but not for a penalty. But the objection here is, that it does not appear on the face of the affidavit to be a case of stipulated damages : it is not stated what the agreement was, nor in what respect it was broken.

Per Curiam,

Rule absolute.

The King v. Palmer.

2 East, 411. June 21, 1802.

The Court directed the sheriff to refund his poundage which he had retained out of money levied upon an attachment for non-payment of money; there being no practice to warrant it; and referred him to his action if he were supposed to have a right to it under the stat. 28 H. 6. c. 9.

AN attachment had issued against an attorney for non-payment of money recovered by him for his clients; under which the sheriff of the city of Worcester had levied the sum due upon the attachment, out of which he claimed to retain for his poundage: whereupon

Gurney moved in the last term, that the said sheriff should pay over to the plaintiffs in the cause or their attorney 7*l.* 15*s.* (being the sum retained by him for his poundage on the levy under the attachment,) together with the costs of the application. He relied on the claim being unprecedented in the instance of an attachment, which was a criminal proceeding, and not included in the stat. 29 Eliz. c. 4, which only authorises sheriffs to take poundage in levying under any *extent* or *execution*.

Wigley, contra, contended that the sheriff was entitled to his poundage on executing an attachment for non-payment of money, that being in the nature of a civil remedy. So one in custody upon an attachment for non-payment of costs, *R. v. Stokes*, Cowp. 136, under stat. 5 & 6 W. & M. c. 11. s. 3, was holden entitled to be discharged under the Lord's Act. And one convicted in a penalty under the Lottery Act, *R. v. Myers*, 1 Term Rep. 265, was deemed privileged from arrest on a *Sunday*. It was there said by Buller, J. to have been settled of late years, that an attachment for non-performance of an award was only in the nature of a civil execution(a). So *Taylor v. Scott*(b). In *R. v. Jetherell*, Parker's Rep. 177, the sheriff was holden entitled to poundage on levying under an extent; and this is confirmed in 5 Com. Dig. tit. *Viscount*, F. 1. [Lord Ellenborough. The stat. 29 Eliz. c. 4, has the words *extent* or *execution*.] Lord C. B. Comyns also says, that the sheriff shall have his poundage on levying a fine for a misdemeanor by process of B. R., for which he cites 2 Jon. 185. The stat. of Elizabeth merely restrained the sheriff in certain cases from taking exorbitant fees; but the statute under which he claims his fees is the 23 H. 6. c. 9, which expressly extends to *attachments* as well as arrests.

Gurney observed, that the omission of the word *attachment* in the latter stat. 29 Eliz. c. 4, when the matter was again under the review of the Legislature, shewed that they intended to exclude the sheriff from taking poundage in such cases; and that construction was confirmed by the universal practice since that time.

Curia adv. vult.

LORD ELLENBOROUGH, C. J. in this term said, that the Court considered it to be a sufficient ground to discharge the rule that there was no practice to warrant the sheriff in taking poundage in this case. That if he were supposed to be entitled to it, he might bring his action for it.

Rule absolute, but without Costs.

(a) Vide also *R. v. Pickerill*, 4 Term Rep. 809.
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(b) Cited in Cowp. 894.

'The King v. The Inhabitants of Upper Pathworth.

2 East, 418. June 21, 1802.

Under the stat. 13 Geo. 3. c. 84. s. 33, this Court may apportion the fine for non-repair of a road between the parish and the trustees of a turnpike, though the indictment were originally preferred at the assizes, and afterwards removed hither by certiorari.

THE defendants, the inhabitants of a parish in *Cambridgeshire*, were convicted on an indictment preferred at the assizes for the non-repair of a turnpike road which led through their parish; which indictment having been removed by *certiorari* at the instance of the prosecutor into this Court, a rule was obtained, calling on the defendants to shew cause why a fine of 1200*l.* should not be imposed on them; and calling on the trustees of the turnpike to shew cause why the fine and charges should not be apportioned between themselves and the parish.

Garrow and *Wilson*, on behalf of the trustees, first took an objection to the jurisdiction of the Court to apportion the fine at all; because the stat. 13 Geo. 3. c. 84. s. 33, which empowers the Court *before whom such indictment or presentment shall be preferred* to impose the fine, directs that it shall be apportioned between the parish and the trustees in such manner as to the said Court upon consideration shall seem just. The application, therefore, can only be made to the assizes where the indictment was originally preferred.

Erskine and *Gibbs* for the parish said, that if such were the construction of the act, this Court would not impose any fine at all on the parish if they were precluded from doing that justice between them and the trustees of the turnpike which the Legislature intended.

LORD ELLENBOROUGH, C. J. I consider the true construction of the act to be, that the Court which imposes the fine shall have power to apportion it between the parish and the trust.

The counsel for the trustees then went into a statement of the funds of the trust, in order to shew that no part of the fine could with security to the creditors and the primary objects of the trust be laid upon them: and the counsel for the parish pressing to have time to inspect these accounts,

The Court after some discussion consented to enlarge the rule for that purpose.

Abbott for the prosecution.

Rule enlarged.

Taylor v. Hague.

2 East, 414. June 22, 1802.

The proper stamp for a promissory note of 45*l.* is 1*s.* 6*d.* composed of three different sums applicable to different funds under three acts of parliament. But such a note on a 2*s.* stamp composed of three different sums applicable to the same funds, though in larger proportions to each than was required, was holden valid.

IN *assumpsit* to recover 45*l.* on a promissory note, dated November 1801, the plaintiff was nonsuited at the trial before Lord *Ellenborough* at the Sittings, because the note was on a 2*s.* promissory note stamp, instead of a stamp for 1*s.* 6*d.* only, which it was admitted was the proper stamp for a note of that value at the time. A rule *nisi* was obtained for setting aside the nonsuit on the ground that the stamp used was not only of a greater value, and therefore covering the proper duty, but it was also a stamp peculiarly appropriated to the same kind of instrument, and therefore applicable to the same purposes as the proper stamp.

Erskine and *Reader* shewed cause against the rule; and referred to *Rob-*

inson v. Dryborough, 6 Term Rep. 317, and *Farr v. Price(a)*, where it was settled that no other than the proper appropriate stamp was sufficient, although the revenue were not injured, as where a stamp of a greater value was used. It is true, that in the former case there was a stamp of a different denomination; but that does not vary the consideration, because the ground of the determination was, that the several duties were appropriated to the payment of distinct funds. They then attempted to shew that a single 2s. stamp adapted to a promissory note of higher value than the present was applicable to different funds from the 1s. 6d. stamp. The stat. 31 Geo. 3. c. 25. s. 1, repeals all former stamp duties of this description; and s. 2. re-enacts new duties; 1st, For promissory notes above 40s. and not exceeding 5l. 6s. a duty of 3d. 2dly, For the same above 5l. 6s. and not exceeding 30l. a duty of 6d. 3dly, For the same above 30l. and not exceeding 50l. a duty of 9d. and so on in proportion. The stat. 37 Geo. 3. c. 90. s. 1, adds 1d. to notes of the first class; 2d. to notes of the 2d class; and 3d. to notes of the 3d class. Lastly, the stat. 41 Geo. 3. c. 10. s. 1, adds 2d. to notes of the 1st class; 4d. to the 2d class; and 6d. to the 3d. class. Then as to the application of the duties, all under the stat. 31 Geo. 3. are by s. 34, (after satisfying certain charges) to go to the consolidated fund. Under the stat. 37 Geo. 3. c. 90. s. 22, the additional duties are applicable in the first instance to the increased charge of any loan made in that Session, and a distinct account thereof to be kept for ten years. And under the stat. 41 Geo. 3. c. 10. s. 12, they are to be applied in like manner to any loan of that Session, and kept apart for ten years, and afterwards to be carried to the consolidated fund. The several parts then of a 1s. 6d. stamp appropriated to a note of this value are 9d. under the first act, applicable to the consolidated fund; 3d. under the second act, applicable to a particular fund; and 6d. under the third act, applicable to another particular fund. Whereas there is no single 2s. stamp which is applicable in adequate proportions to the same funds; nor any 2s. stamp, however made up, which is applicable to a note of this value.

The Court thereupon desired inquiry to be made how the 2s. stamp on which the promissory note in question was written was constituted, whether composed of a single sum, or of different sums amounting to 2s.: because it was observed that a 2s. stamp might be composed of 1s. under the stat. 31 Geo. 3.; of 4d. under the stat. 37 Geo. 3.; and of 8d. under the 41 Geo. 3.: in which case the several component parts would be applicable, though in a larger proportion than was necessary, to the several funds to which the several component parts of the proper 1s. 6d. stamp was directed to be applied.

The matter stood over to ascertain the fact; and it appearing that the note in question was composed of a 1s., a 4d. and an 8d. stamp, the Court observed that the foundation of the objection was now removed; for it appeared that more than sufficient of the stamp used was applicable to the respective funds to which the proper 1s. 6d. stamp was appropriated.

Rule absolute.

Gibbs, who was to have supported the rule, referred to s. 19. of 31 Geo. 3. which provides, that no promissory note, &c. shall be given in evidence in any court unless "stamped with a lawful stamp to denote the duty as by that act directed, or some higher duty in that act contained," &c.: and the subsequent acts refer to and incorporate the general provisions of the former.

LAWRENCE, J. in the course of discussing the case on the former day, adverted to another statute in *pari materia* 37 Geo. 3. c. 136. s. 1, which enables the commissioners where any note, &c. is written on a stamp of a different denomination, but of an equal or greater value than the stamp required, to affix the proper stamp on payment of a penalty of 5l.

The King v. The Inhabitants of St. Helen, in the City of Worcester.

2 East, 417. June 23, 1802.

AN order for taxing one parish in aid of another under the statute 43 Eliz. c. 2, s. 8, held well; although the *two* parishes, together with others, were incorporated for the maintenance of their poor, with fixed quotas of contribution between each other, under special officers, who were empowered to purchase land for the erection of poor-houses and for a burial ground; there being a proviso in the act in general terms, that nothing therein contained should extend to repeal or lessen the power of justices of the peace "to tax *parishes* in aid of others by virtue of the statute 43 Eliz. as fully as if this act had not been made.

AN order was made by the justices at the Quarter Sessions holden for the county of the city of *Worcester*, grounded on the stat. 43 Eliz. c. 2, s. 3.

By which order (removed into this Court by *certiorari*) dated 5th April 1801, and directed to the churchwardens and overseers of the poor of the parish of *St. Helen*; "after reciting that complaint had been made unto that court that the parish of *Saint Andrew* in the said city of *Worcester* and county of the same city was greatly overburthened with poor, and that the inhabitants of the said parish were unable to raise and levy among themselves sufficient sums of money for the maintenance of the poor thereof: and after further reciting, that it had also been represented unto that Court that the inhabitants of the parish of *St. Helen* in the said city and county of the same city were of sufficient ability to aid and assist the inhabitants of the said parish of *St. Andrew* in the maintenance of the poor thereof: that Court upon hearing (the parties), and upon due proof, &c. adjudged the said premises to be true, &c.; and did thereby, in pursuance of the statute in that case made, rate and assess the said parish of *St. Helen* at the sum of 1*l.* 12*s.* 8*d.* monthly and every month in aid of the said parish of *St. Andrew*: and did thereby order the overseers, &c. of *St. Helen* to pay the said sum of 1*l.* 12*s.* 8*d.* to the overseers, &c. of *St. Andrew* from the 5th of *October* then instant until the 1st of *April* next, for and towards the purposes in the said act mentioned."

It was not denied but that the order was good under the statute of Elizabeth: but it was contested upon the ground of a local act of parliament passed in the 32 Geo. 3, c. 99, intitled "an act for the better relief and employment "of the poor of the several parishes within the city of *Worcester*, and of the "parishes of *St. Martin* and *St. Clement* which are partly within the city "and partly within the county of *Worcester*, and for providing a burial ground "for the use of such parishes." That act reciting that the poor within the several parishes named, (including *St. Andrew's* and *St. Helen's*) are supported at a burthensome expence, for their assistance and relief incorporates them by the name of "the wardens of the poor of the several parishes in the "city of *Worcester* and of the parishes united therewith;" and directs how the principal officers, therein called "directors," and certain other officers shall be chosen from time to time. It then enables the directors to purchase land and erect buildings thereon for the purposes of the act, and also to purchase other land for "a burial ground, for the general use of all the parishes afore-"said in manner therein mentioned; which burial ground should be the property of the corporation who were to have all the produce and benefit therefrom, allowing to the inhabitants of the parishes the privilege of burial there "on payment of 5*s.* for each corpse," &c. It enacts that the directors shall have the management of the poor, and enables them to enclose part of the ground next the house of industry for a burial ground for such as die in the said house; and enables them generally to provide for the relief of the poor, placing out apprentices, &c. It also gives them a power to borrow money not

exceeding 10,000*l.* and to secure the interest and principal. Then in order to raise an adequate fund for the purposes of the trust, the directors are "*empowered to fix and ascertain* with as much equality and fairness as may be, "such sums of money (regard being had to such average of the rates within "the said several parishes as thereafter mentioned), upon the said several "parishes as should be needful from time to time, for paying the interest of "the money borrowed, paying off the principal, and defraying the charges and "expences of maintaining the poor, and for all other the purposes of the act." It then directs how the quotas of the respective parishes are to be fixed, *according to the average expenditure of each parish for the five preceding years, &c.* Afterwards there is a proviso "that nothing in this act contained shall "extend, &c. to repeal, lessen, or alter the power of justices of the peace to "tax parishes in aid of others by virtue of the stat. 43 Eliz. or otherwise; but "that the same powers shall be and remain as fully and effectually to all intents and purposes as if this act had never been made." The directors are also empowered to grant certificates, and to take bonds of indemnity against bastards, and are enabled to control the overseers in appealing against orders of removal of poor persons.

Onslow, Serjt. took objection to the order on the ground that the act of the 32 Geo. 3. had superseded the provisions of the 43 Eliz. in this respect; and that the saving proviso in the stat. of Geo. 3. was merely intended to apply as between the incorporated parishes and other parishes in the county at large: for it mentions the ward *parishes* generally, and not the *said parishes* as in other parts of the act, where the incorporated parishes are meant to be referred to. He contended, that the provisions of the two acts were incompatible, and the money to be raised under each was applicable to distinct objects, amongst others under the stat. of Geo. 3. for the purchase of land and building of houses, and the purchase of a burial ground; whereas under the stat. of Elizabeth it could only be applied to the employment and maintenance of the poor. Different officers too were appointed to collect the money by the two statutes. The latter statute also fixes a certain proportion of contribution between the respective incorporated parishes, which is altogether inconsistent with the order in question, and is in effect repealed by it. He also commented on the particular wording of the order and the stat. 32 Geo. 3.

Gaselee and *Jervis*, contra, relied principally on the proviso, by which the order in question, under the stat. of Elizabeth, was saved: though they also contended that the two statutes were not inconsistent in their general provisions, the one being in aid of the other.

LORD ELLENBOROUGH, C. J. This is a very plain case upon the construction of the stat. 32 Geo. 3. which was passed for the better maintenance of the poor in the city of *Worcester*. The several parishes of the city, which subsisted distinctly before the act, were thereby incorporated for certain purposes; but for all others they still continued to be as distinct as before. Before that act they certainly might have been rated in aid of each other under the stat. 43 Eliz.; and for fear it should be doubted whether the act of Geo. 3. did not do away the provision of the former act in that respect, the proviso in question was introduced, in which it is expressly saved. Then it is said, that this was only intended to apply to extra parishes, and not to the parishes incorporated, but the wording is general, reserving power to the justices to tax *parishes* in aid of others as fully as before; that extends to all parishes. For this purpose, therefore, the incorporated parishes were still to remain independent as before, whenever the respective quotas directed to be raised under the local act were found insufficient to provide for the maintenance of their respective poor.

GROSE, J. The proviso referred to expressly saves to the incorporated parishes the benefit of the 43 Eliz. in this respect as before the act of Geo. 3.

LAWRENCE, J. The proviso is in general words; and is not narrowed, as

contended for, to other parishes than those incorporated; but extends to all alike, as well those in the county at large, as those in the county of the city of *Worcester*, not included in the act(a). It is said, that the proviso could not be intended to include the incorporated parishes, because the money, when raised under the present order, is to be carried to different purposes, than those directed by the stat. 43 Eliz. under which it is made. But that is begging the question: the money raised under the local act must indeed be applied as that act directs; but the money raised under the stat. 43 Eliz. is to be applied as that statute requires.

LE BLANC, J. The argument in support of the objection has proceeded on the very ground which the proviso was intended to obviate: for without the introduction of that proviso it might have been argued that the statute had fixed certain quotas between the incorporated parishes, which were meant to be irrevocable. But the Legislature having in view that cases might occur, where those quotas would not be sufficient for the maintenance of the poor of any particular parish, have directed that notwithstanding the quotas should be fixed between the incorporated parishes, according to a certain average rate, for the purposes of the local act, yet that money might still be raised as before, by taxing parishes in aid of others, under the stat. 43 Eliz. for the purposes directed by that statute. And it is no answer to say, that the money, when raised under this order, will be applied to the same purposes as the fund raised under the local act; for if the objects of the latter be different from those of the stat. 43 Eliz. it will not follow that the money raised under the one will be applied to the purposes of the other: but the money raised under either will be applied to its own respective purposes. However, I do not see that the objects of the two acts are essentially different: the local act was in aid of the 43 Eliz. They have both the same general object, to provide for the poor. But it is not necessary to go that length; because if the purposes to which the money is to be applied under the two acts be different, it will not follow that the money to be raised under this order will be applied to the purposes of the local act.

Order confirmed.

The King v. The Inhabitants of Hanbury.

[2 East, 428. June 23, 1802.]

A hiring at so much a week, meat, drink, washing, and lodging, and to part on a week's notice by either party, will not warrant a conclusion of a general hiring, though the servant continued six years with the master, and the wages were raised during the period: and therefore no settlement can be gained under such hiring and service.

TWO justices by an order removed *J. Freeman*, *Mary* his wife, and *Ann* their daughter, from the parish of *Tardebigg* to the parish of *Hanbury*, both in the county of *Worcester*. The Sessions, on appeal, confirmed the order, subject to the opinion of this Court on the following case; The pauper, *John Freeman*, a blacksmith, went six and thirty years ago to one *Saunders* a blacksmith at *Hanbury*, to know if he wanted a man. *Saunders* told him he might come to work for a day or two, and he should see what he could do. The pauper went accordingly on the following *Monday* morning, and after two or three days' trial *Saunders* approving of him, the pauper agreed to work for *Saunders* as a blacksmith, at three shillings and sixpence a week, with meat, drink, washing, and lodging at *Saunders'* house, and to part on a week's notice by either party. No such notice was ever given; but the pauper continued to serve *Saunders* until the time of his death, which

(a) There were stated to be two other parishes in the city not included.

happened about six years afterwards, without any alteration of terms, except that after he had served about four years the wages were raised from three shillings and sixpence to four shillings a week. The pauper constantly received his week's wages every *Saturday* night or *Sunday* morning. He went where he pleased on *Sundays* without asking leave of his master; though he was entitled to his board on *Sundays* as well as on other days if he chose to stay at home. He did not work on *Sundays* as the apprentices did who were kept at home for that purpose, except occasionally when asked by his master. On other days, if he wanted a holiday he used to ask his master for it, who gave it him, deducting his wages for the time. His master also used frequently to set him task work for the day which he sometimes finished in half the day, and then he was at liberty for the rest; but he frequently did over work upon those occasions; and then he was paid for such over work. The Sessions, being of opinion that this was a general hiring, confirmed the order.

Touchet, in support of the orders, contended 1st, that the mere continuance of the service for six years was sufficient to warrant the conclusion that there was a general hiring during the period, which the law construes to be a hiring for a year; for which he referred to *Rex v. Lyth*, 5 Term Rep. 327, and *Rex v. Long Whatton*, lb. 447, in which latter case it appeared that the servant was at first only hired for a part of the year. [Lord ELLENBOROUGH, C. J. Here the particular terms of the original agreement are stated, and therefore we cannot presume that the pauper served under a different contract.] 2dly, The hiring was for an indefinite time, though the rate of wages was calculated at so much a week: and when the wages were raised nothing was said about time. At any rate, it was a question of fact for the Sessions, and there was evidence sufficient to warrant the conclusion they have drawn. The reservation of weekly wages in *Rex v. Hampreston*, 5 Term Rep. 205, did not prevent the operation of a general hiring.

Gibbs and *Jervis*, contra, were stopped by the Court.

Lord ELLENBOROUGH, C. J. The cases of *Rex v. Dedham*, Burr. S. C. 653, *Rex v. Brandninch*, lb. 662, and *Rex v. Newton Toney*,^(a) have expressly decided this point. The first of these was much stronger than the present; for that was a hiring at so much a week, "summer and winter." But Lord Mansfield said, that all the cases required a hiring for a year: but that was only a hiring at so much a week. So in *Rex v. Brandninch*, Lord Mansfield observed, that the pauper was under no obligation to serve for a year; and unless that be so, it is clear there can be no settlement gained. The case of *Hampreston* turned on the circumstance of a month's notice to quit being required; but here the contract was determinable at a week's notice. And though the Sessions have drawn a conclusion that this was a general hiring, yet it is clear that they meant only to state it as a conclusion of law from the antecedent facts, the propriety of which they meant to refer to us. But here there is no ground for presuming a general hiring; for it appears expressly what the original agreement was in fact, which negatives a hiring for a year⁽¹⁾.

Per Curiam,

Both orders quashed.

(a) 2 Term Rep. 453, and vide *Rex v. Odham*, ib. 622. S. P.

(1) Vide *The King v. The Inhabitants of Mifcham*, 12 East, 351.

Maitland and Others v. Goldney and Another.

2 Fast, 426. June 25, 1802.

In a justification of slander, that the defendant named the original author of it at the time, it is not sufficient to allege that the original slanderer used such and such words *or to that effect*; although in the libel declared on the defendant stated that another had spoken the same slanderous words of the plaintiff *or words to that effect*: but the defendant must give the very words used, though it be only necessary to prove some material part of them. *Qu.* Whether a defendant can by naming the original author justify the publishing in writing slanderous words spoken by such other; especially after knowing that they were unfounded?

IN an action on the case, the first count of the declaration stated, that whereas the plaintiffs before *March* 1800 exercised in copartnership the trade of merchants and dealers in wool, and conducted themselves with honesty in such trade, and delivered just and true accounts to their customers, &c. and before the publishing the libel after mentioned enjoyed in their said trade a good name and credit and the confidence of their customers: and whereas one *Henry Guy*, before the said *March*, and until the time of composing and publishing the libels hereinafter first and secondly mentioned, was a customer of the plaintiffs in their said trade, and the plaintiffs had always delivered to him just and true accounts, &c.: and whereas the plaintiffs had a long time before, &c. to wit on 1st *March* 1800, made out and sent to *Guy* a true account of certain dealings between him and them in their trade, upon the receipt of which account *Guy* afterwards *hastily and rashly* uttered certain expressions importing that he was dissatisfied with the said account, and very much disapproved thereof, *but afterwards and long before the composing and publishing of the libel* (in question) *the conduct of the plaintiffs* with respect to the said account, &c. *was fully explained and justified to the said H. Guy, and he was fully satisfied therewith*, and thenceforth, until, and at the time of publishing that libel, reposed his entire esteem and confidence in the plaintiffs in their said trade, and continued to deal with them, &c. *of all which premises the defendants* afterwards, and before the publication of the libel hereinafter next mentioned, *had notice*: yet the defendants *well knowing the premises*, but maliciously contriving and intending to injure the plaintiffs in their said trade, and to cause them to be believed to be guilty of dishonesty and making false accounts, &c. on the 14th *December* 1801, at, &c. unlawfully and maliciously composed and published a certain libel of and concerning the said plaintiffs, *and of and concerning the said account so by them made out and sent to the said H. Guy*, and of and concerning the said *H. Guy*, and the aforesaid expressions so by him uttered, to the tenor and effect following, *viz.*

"*Thomas Goldney of Chippenham, &c. and Harry Goldney of &c. clothiers, severally make oath and say; and first the said H. Goldney for himself saith, that some time in the latter end of March* 1800, he was present at the *White Hart* inn in *Chippenham* aforesaid, and then and there heard *Henry Guy of Chippenham* aforesaid, clothier, publicly declare that he had just received (the plaintiff's) account, &c. that the account was near 400*l.* less than he expected, and that their (meaning the plaintiffs) conduct, was worse than robbing on the highway, *or words to that effect*; and that he would immediately go to *London* and bring an action against them; and this deponent *T. Goldney* for himself saith, that soon after the said *H. Guy* had received his account from the house of (the plaintiffs), as this deponent believes, the said *H. Guy* came to this deponent's counting-house at *Chippenham* aforesaid, and then and there asked this deponent, *T. Goldney*, whether he had received his account from (the plaintiffs), and this deponent replied that he had received his account;

and the said *H. Guy* asked him the said *T. Goldney* how his account was, and said that they (meaning the plaintiffs) had robbed him of near 400*l.*, that it was as bad as robbing on the highway, and that he would arrest the house and drop all kind of connexion with them : *or words to that purport and effect.*" The second count only differed from the first in not stating that the words spoken by *Guy* were "hastily and rashly uttered;" and in only stating that *Guy* was afterwards satisfied with the account, without stating that the plaintiffs' conduct was justified to him. The third count charged the libel to relate to a certain account therein alleged to have been delivered by the plaintiffs to *Guy*; but did not state that an account had been delivered, or that *Guy* had expressed himself to be dissatisfied with it, or that he was afterwards satisfied; or that the defendants *knew* those facts before the publication of the libel in question.

Pleas. 1st, Not Guilty. 2. As to the first and second counts, the defendants justify jointly, that before the respective times of composing and publishing the said supposed libels respectively, &c. to wit, on the 1st of *April*, 1800, the said *H. Goldney* was present at the said *White Hart* inn in *Chippenham* aforesaid, and then and there did hear the said *H. Guy* publicly declare to the effect following, that is to say, that he had just received *Mailand's* account, (meaning his annual account from the house of the plaintiffs); that the account was near 400*l.* less than he expected; and that their (meaning the plaintiffs') conduct was worse than robbing on the highway; and that he would immediately go to *London*, and bring an action against them." And the defendants further pleaded, that soon after the said *H. Guy* had received the said account, &c. from the plaintiffs, before the respective times of composing and publishing the said supposed libels respectively, to wit, on, &c. the said *H. Guy* came to his, *T. Goldney's* counting-house, at *Chippenham* aforesaid, and then and there asked the said *T. Goldney* whether he had received his account from (the plaintiffs) and the said *H. Guy* then and there upon asked him, the said *T. Goldney*, how his account was, and then and there said to the effect following, that is to say, that they (meaning the plaintiffs) had robbed him of near 400*l.*; that it was as bad as robbing on the highway, and that he would arrest the house and drop all kind of connexion with them, to wit, at, &c. wherefore the defendants at the said respective times when, &c. composed and published the said libels, &c. The defendants also justified separately to the third count in the like manner.

To these justifications there were demurrers assigning for special causes; that the defendants have not by their second plea justified or answered the special matter in the inducements to the first and second counts respectively contained, nor have averred that the matters in that plea alleged to have been declared and said by the said *H. Guy* are, or that any part thereof is true; nor that the said *H. Guy*, or any other person or persons than the defendants, ever wrote or printed, &c. those matters or any part thereof; nor have they, the defendants, in or by that plea denied that before the composing or publishing the said libels in those counts respectively mentioned, or either of them, the conduct of the plaintiffs respecting the said accounts, &c. was explained and justified to the said *H. Guy*, and that he was satisfied therewith, and reposed his esteem and confidence in them, and continued to deal with and employ them in their said trade, and that they, the defendants, had notice thereof; and also for that the matters contained in that plea do not amount to any traverse or denial of the said first and second counts, but are consistent therewith; neither do those matters contain any justification or excuse of the malice or misconduct of the defendants, or of the causes of action, &c. Also, that the matter thereby attempted to be put in issue is immaterial and irrelevant, &c. Similar causes of demurrer were assigned to the third plea.

Abbott, in support of the demurrers, contended, 1st, that no person could

justify the publishing in *print or writing*, slanderous words *spoken* of another although he named the speaker, But 2dly, if he could, he must at any rate publish the exact words, and not take upon himself to judge of the import and effect of them. 3dly, (which applied only to the demurrers to the pleas to the two first counts,) that in no case could the publication of slanderous words spoken by another be justified after the publisher *knew* that the person who uttered the slander was convinced of his mistake. 1. There is a great difference between the malignity and injurious consequences of slanderous words *spoken* and *written*; the one is sudden and fleeting, the other is permanent, more deliberate, and more widely disseminated. This distinction is recognized in the books; for many words, which, if spoken would not be actionable, are actionable if written; as in *Bell v. Stone*, 1 Bos. & Pull. 331, where many cases to that purpose are collected: *Austin v. Culpepper*, Skin. 124, and 2 Show. 313, *Harman v. Delany*, 2 Stra. 899, and Fitzg. 253, *King v. Lake*, Hardr. 470. 1 Saund 120, *Villers v. Mousley*, 2 Wils. 403, and *Janson v. Stewart*, 1 Term Rep. 748. But it will be said, that it is the same whether the slander were all spoken or all written, and that no action will lie in either case, if the original author of it were named at the time; and *Lord Northampton's case*, 12 Co. 134, may be relied on for this purpose: but that was not the point in judgment; for ultimately all the defendants there were punished. The case of *Crawford v. Middleton*, 1 Lev. 82, is to be sure in point; but *Twisden, J.* differed from the rest of the Court; and his opinion is the more entitled to weight; for certainly it was not necessary, as the three other Judges supposed, to allege in the declaration, by way of negative, that the defendant had not met any person on the road who had told him the slanderous words imputed. The case of *Davis v. Lewis*, 7 Term Rep. 17, only decides the converse of the proposition, that as the defendant did not, at the time of repeating the slander, name the party who uttered it to him, it was not sufficient to name him in his plea. Sound policy is against the admission, much more the extension of this kind of justification; for every repetition of a slander is a new injury, and sometimes is an aggravation of the first: as, if the occasion be more public, or the slanderer a person of greater weight. By the rule of the civil law, every publisher of slander was punishable as the original author. Codex, lib. 9. tit. 36. 2. At any rate, however, the party justifying must take care to publish, if at all, the exact words of the original author of the slander, and not what he is pleased to call *the purport and effect* of the slanderous words. In actions for slander and indictments for libels, as well as in justificatory pleas of this sort, it is always usual to state the words themselves, and not the effect of them; for otherwise the party pleading makes himself a judge of the purport and effect, which the law does not admit. The very reason why the second speaker is excusable in any case is, because he gives to the party injured a certain cause of action against the original speaker; but that is not the case here: for if the plaintiff were to charge the first speaker in an action of slander, and only allege in his declaration that he had spoken such and such words *or to that effect*, that would not sustain the action: neither would it suffice if the words were stated without that addition, if the present defendants when called as witnesses, could only prove, what they have in their plea here alleged. For though it be not necessary to prove all the very words which are laid, yet some certain words must be proved, agreeing in substance with the words laid. But 3dly, no person is allowed to publish the hasty slander of another, after he knows that the person who first uttered it is convinced that he was mistaken. This is specially charged against the defendants in the first count, and is the gist of that count, and must be proved by the plaintiffs; otherwise under the general issue the defendants will be entitled to a verdict; the special plea to it therefore amounts to no more than the general issue. In *Gerard v. Dickinson*, 4

Co. 18. b, it was holden that slander spoken by the defendant against his own knowledge made him liable at all events.

Holroyd, contra, said he should first consider the special plea to the 3d count: because if that were not good, of course the others could not be maintained. To maintain an *action* for slander, the words spoken or written must be *false* as well as malicious. This was so settled in Lord *Northampton's* case, 12 Co. 133, and all the subsequent cases. The fourth point there resolved was, that in a private action for slander, if *J. S.* publish that he hath heard *J. N.* say that *J. G.* was a traitor or thief, in an action of the case, if the truth be such, he may justify. The same was considered in *Davis v. Lewis*, 7 Term Rep. 17. But it is attempted to distinguish this from other cases, because the defendants published *in writing*, that which before was only *spoken*. Admitting, however, that there may be a distinction in the respect stated, namely, where the words were not actionable before they were reduced into writing, that distinction does not apply here: because the words in question having been spoken of the plaintiffs in their trade, were in themselves actionable, as much so as if they had been originally written. And as to the greater mischief of written than of parol slander, the law has provided an additional remedy for it, namely, by indictment. Neither does the mere stating that another person said such and such things of the plaintiffs give any confirmation of or authenticity to the slander, as it must still stand upon the authority of the original propagator of it. Nor is any special damage charged to have ensued from it. Therefore, all that the defendants said being true, and no special damage being stated, no action lies, there being neither *damnum* nor *injuria*. [Lord *Ellenborough* desired that he would endeavour to answer the objection, which pressed chiefly on the attention of the Court, that on the information as disclosed by the pleas, the plaintiffs could not have maintained an action against *Guy* for the slander.] The usual way, to be sure in declaring in these actions, is to state that the defendant spoke such and such words; but it has never been holden necessary to prove every identical word as laid: proving the substance of them is sufficient. It is so in the case of libels; though there if the party affect to set out the very words, he must prove them. Here the words themselves are given, though the defendants have also added, *or to that effect*. But it would be sufficient for the plaintiffs to declare on those words against *Guy*, though they could only prove words to the same effect. [*Lawrence*, J. Though it be not necessary to prove all the very words alleged, yet it is necessary to prove some material part of them; and it would not be sufficient to prove equivalent words of slander.] The demurrer admits the words justified to be substantially the same as those spoken. With respect to the justification pleaded to the first and second counts admitting that an action lies for publishing slander originally uttered by another after knowledge by the defendant that it was untrue, yet that is no cause of demurrer to the justification pleaded, but such previous knowledge should have been specially replied, in order to shew that the plaintiffs meant to rely on it; because, as it is stated in the declaration, it is mere matter of aggravation, and need not have been proved; the gist of the action not being the knowledge, but the falsely and maliciously publishing the libel. As where to an action for a voluntary escape, the defendant may plead a recaption as if in case of a negligent escape; and if the plaintiff mean to rely on the *voluntary* escape, he must reply it specially; because the actual *escape* is the gist of the complaint, and the allegation in the declaration, of its being *voluntary*, is only to be taken as matter of aggravation, unless the plaintiff by his replication shew that he insist on it as a substantive cause of action(a). So in an action on a bond, in which the condition is stated and breaches as-

(a) *Sir R. Boscawen's* case, 1 Ventr. 217, and vide *Boscawen v. Walker*, 2 Term Rep. 126.

signed in the declaration, yet if the defendant plead performance, it has never been holden that the plaintiff must not insist on the breaches in his replication. So in an action of trespass for impounding cattle and converting them to the defendant's use, the conversion is not the gist of the complaint, though it may become so by the replication; and the conversion need not be answered by the plea. *Dye v. Leatherdale*, 3 Wils. 20. Here it would have been sufficient, on the plea of the general issue to the first count, for the plaintiffs to have proved the publication, without any of the previous circumstances in aggravation. And if a special plea select a fact not material to maintain the declaration, and put that in issue, it is demurrable.

Abbott, in reply, insisted that the plaintiffs could not sustain the two first counts, by proving the several matters alleged therein, prior to the publication, which, as there stated, grew out of such previous matter, and was inseparably connected therewith. The libel is charged to have been published of and concerning *the said account* so made out and sent to the *said Guy*, and of and concerning the *said Guy*, and the *aforsaid* expressions so by him uttered, &c. which expressions are before stated to have been uttered hastily and rashly, and the matter to have been explained to *Guy's* satisfaction, and this with the knowledge of the defendants before the publication of the libel. The plea does not allege that the words spoken by *Guy* were true, but only that in fact he had uttered such words *or to that effect*: therefore, unless it would be sufficient for the plaintiffs to declare in that manner against *Guy*, the defendants have not given them a certain cause of action over by their plea; and it must be taken that the defendants, when called as witnesses in such action, could prove no otherwise than as they have pleaded, which would not be sufficient. But at any rate, there is a great difference between written and oral slander; and for the reasons before given the rule laid down in Lord *Northampton's* case does not apply to the present.

LORD ELLENBOROUGH, C. J. Without considering the extent of the rule laid down in Lord *Northampton's* case, of which it is sufficient at present to observe, that that was a case of oral and this is one of written slander, the ground on which we are disposed to decide the present question steers clear of that and all other cases. In order to maintain this species of action it is necessary that there should be malice in the defendant and an injury to the plaintiff, and that the words should be untrue. By the first count the charge in substance against the defendants is, that they revived and published an injurious report of the plaintiffs, which had been made by another person who was afterwards convinced that he had uttered the words hastily and rashly; and that the defendants did this with full knowledge of all those circumstances. All the several allegations of the previous report, the subsequent explanation of the plaintiffs' conduct to *Guy*, his satisfaction with it, and the defendants' knowledge of it, are so interwoven by the pleading with the publication of the libel that they could not be severed from it, so that the plaintiffs could sustain that count by proof of the publication alone of the libel without such explanatory circumstances. The plaintiffs could not entitle themselves to recover on it unless all were proved. The count then contains a charge against the defendants, that they published the slander with the knowledge that the person who had originally uttered it was satisfied that it was untrue. The fact, therefore, of such previous uttering was merely used by the defendants as a pretence for publishing the same slander: that shews malice in the defendants and an injury to the plaintiffs. But without going into that point, at all events in order to justify the parties reviving the slander by naming the original author of it, they must so disclose the matter as to give the plaintiffs a certain cause of action against the party named: now here they only state that the other uttered such words, *or to that effect*; and if the defendants when called as witnesses to support the action against *Guy* could only prove that he uttered words *to the effect* of those set forth,

that would not be sufficient. On this ground alone without going into the other objection, it is enough for us to say that the justification cannot be supported.

LAWRENCE, J.(a) I am of the same opinion on the ground stated by my Lord, without going into Lord *Northampton's* case as applied to written slander. And without considering whether or not it be necessary to prove all the previous allegations in the two first counts, it is sufficient to say, according to the rule in Lord *Northampton's* case, supported in the late case of *Davis v. Lewis*, 7 Term Rep. 17, that in order to justify the repetition of slanderous words spoken by another, the defendant must give a certain cause of action against that other; and that must be done not only by naming the author of the slander, but also by giving the very words used: and it is not sufficient either to state words to the same effect, or to prove words to the effect of those alleged. For I take the rule in actions of this sort to be, that though the plaintiff need not prove *all* the words laid, yet he must prove so much of them as is sufficient to sustain his cause of action, and it is not enough for him to prove equivalent words of slander.

LE BLANC, J. Without entering into the consideration of Lord *Northampton's* case, the rule is clearly established that in order to justify the repetition of slander the defendant must state the name of the person by whom it was first uttered so as to furnish the plaintiff with a cause of action against him. But this rule would be nugatory if the defendant were merely to name the person without also stating what he had uttered with such precision as to enable the plaintiff to maintain his action against him. For this purpose the defendant must state the very words themselves used, and not merely the effect of them(1). With respect to the two first counts, they state circumstances which shew that though the defendants only published slander which had before been uttered by another person named, yet that it was published by the defendants under such circumstances as do not appear to me to come within any of the cases where such previous uttering has been holden to be a justification to another by whom it was revived.

Judgment for the Plaintiffs(2).

Sampson v. Brown and Another.

2 East, 439. June 25, 1802.

A writ of error allowed, though not returned, is in itself a *supersedeas*; and may be pleaded by the bail to have been issued and allowed after the issuing and before the return of the *ca. sa.* against the principal, so as to avoid proceedings against them in *scire facias*, upon the recognizance of bail, prosecuted after a return by the sheriff of *non est inventus* made pending such writ of error.

THE plaintiff declared as of Hil. 42 Geo. 3, in *scire facias* against the defendants as bail of one *John Mac Guire*, and stated the first writ against the principal to be tested the 25th June, 41 Geo. 3, returnable on *Friday* next after the morrow of *All Souls*, to which *nihil* was returned; and then stated a second writ returnable on *Thursday* on the morrow of *St. Martin*; to which another *nihil* was returned: and thereupon the plaintiff prayed execution to be adjudged to him of the debt and damages, according to the form of the recognizance of bail.

(a) *Grose*, J. was absent from indisposition.

(1) The rule here laid down was soon afterwards recognized in *Woolnoth v. Meadows*, 5 East 471. That the publisher of a libel is liable in damages, notwithstanding the libel is accompanied with the name of the author, see *Dole v. Lyon*, 10 Johns. Rep. 447.

(2) [The republication of another person's slander is actionable. 3 Stephens' N. P. 2563—4, and cases cited.—W.]

Plea, that after the judgment against *Mac Guire* a writ of *capias ad satisfaciendum* issued against him directed to the sheriff, returnable on *Wednesday* next after 15 days of the *Holy Trinity*, and that *before the same was returnable or returned*, viz. on 15th *June* 1801, a writ of error was duly issued out of Chancery directed to Lord *Kenyon* the then Lord Chief Justice of B. R., commanding him that the record and proceedings of the said suit and judgment (against the principal) should be brought before the Justices of C. B. and Barons of the Exchequer in the Exchequer-chamber on *Tuesday* the 23d *June* 1801, according to the form of the statute, &c. as by the said writ of error now remaining with the proper officer of B. R. in that behalf not yet returned by the said Chief Justice more fully appears: which said writ of error afterwards, and before the said writ, or any writ of *capias ad satisfaciendum* on the said judgment against *Mac Guire* was returned or returnable, viz. on 16th *June* 1801, was duly allowed, &c. according to the course and practice of the said Court. The plea then averred, that the said writ of *ca. sa.* so issued against *Mac Guire*, viz. on the 19th of *June* 1801, was returned by the sheriff pending the said writ of error, and whilst the same was in full force and effect, and during the time that the said writ of error was a *supersedeas* to the said *ca. sa.* upon the said judgment, and wholly superseded the execution of any such writ. And that *Mac Guire* after giving the said judgment, and before the issuing of any other *ca. sa.* against him, viz. on 16th *November* 1801, surrendered himself, &c. in satisfaction of the judgment and in discharge of his bail, &c.

Replication; that on *Tuesday* next after the octave of *St. Martin*, 42 *Geo.* 3, a certain rule or order was applied for by the defendant, and was made by the said Court of B. R., whereby on reading the affidavit of *W. M.* it was ordered that the plaintiff should on *Friday* next after 15 days of *St. Martin* then next shew cause why all proceedings against the bail of *Mac Guire* should not be set aside for irregularity; it then stated, that the said affidavit of *W. M.* set forth the several matters in the defendant's plea alleged, touching the issuing and return of the said *ca. sa.* and the issuing and allowance of the said writ of error; and that such proceedings were had on the said rule that afterwards, viz. on *Saturday* next after 15 days of *St. Martin*, cause was shewn on behalf the plaintiff, and the rule was discharged, &c.

To this there was a demurrer, shewing for special causes, amongst others, that it does not appear by the replication that the said rules or orders therein alleged to be made were made in the said cause now depending on the said recognizance. There were several other causes assigned: but as it was admitted that the replication was bad, and the whole argument turned on the validity of the plea, it is unnecessary to state the rest, which applied to parts of the replication not herein set out *verbatim*.

Wigley, in support (of the demurrer to the replication, and) of the plea, contended that the allowance of a writ of error operated as an absolute *supersedeas* in law, so as to avoid any further proceeding, without any express notice to the plaintiff below not to proceed. 2 *Rol. Abr.* 492, l. 10. *Smith v. Cave*, 3 *Lev.* 312, *Perkins v. Woolaston*, 1 *Salk.* 321, *Sweetapple v. Goodfellow*, 2 *Stra.* 867, *Smith v. Nicholson*, *Ibid.* 1186; 2 *Ld. Raym.* 1260, *Dudley v. Stokes* 2 *Blac. Rep.* 1183, *Perry v. Campbell*, 3 *Term Rep.* 390, *Bedwell v. Black*, *Ibid.* 643, and *Miller v. Newbald*(a); so that even a return of *non est inventus* by the sheriff (after a writ of error allowed) to a *capias*, before issued is a nullity: for as it is said(b), the sheriff cannot even look after the defendant to ground such a return upon. Though in *Miller v. Newbald* the Court said they sometimes refused on summary application to stay proceedings pending a writ of error, leaving the party to his ordinary remedy:

(a) *Ante*, 1 vol. 662, and vide *Meriton v. Stevens*. *Willes*, 271.

(b) *Ibid.* 1186, and 2 *Ld. Raym.* 1260.

Whatever may have been formerly practised, it is no longer required, if it ever were, to sue out a writ of *supersedeas* upon the allowance of the writ of error: and the only instances where it has been done in modern times have been where a defendant having been taken in execution could not get his discharge without it. But here the writ not having been executed, there was nothing to supersede. These defendants too (the bail) were no parties to the original suit, and have no notice of the default of the principal till after the return to the *capias*. But the *capias* must be *returnable* before the issuing of the *scire facias* against the bail, though no issue can be taken on the time when it was in fact returned, 3 Term Rep. 390. And though it had been competent to them to have sued out a writ of *supersedeas*, at least it was a matter of discretion which they were not bound to do.

Marryat, contra. This is an attempt to plead matter of practice which is not allowable. In a case of *Carmichael v. Troutbeck* and another, bail of *Chandler*, in Easter term 1784, to an action by the assignee of the bail bond it was pleaded that the cause was out of court for want of a declaration before the assignment; and on demurrer the Court held that as matter of practice it was not pleadable; and thereupon the plaintiff had judgment. Now the return of the *capias* is mere matter of practice, as appears from *Ball v. Manu captors of Russel*, Salk. 602. Even the issuing of the writ of *capias ad satisfaciendum* against the principal is with respect to the bail only matter of practice not required by any law, and merely intended to give the bail notice to render the principal. There is no instance of the allowance of a writ of error (by way of *supersedeas*) being put on the record by plea, although the occasion must continually have occurred. It is the daily practice to apply to the Court to stay proceedings pending a writ of error, which is sometimes refused if it appear to have been sued out for delay; and sometimes plaintiffs obtain leave to sue out execution pending a writ of error. In all these cases, if this plea be good, the Court would be authorizing a trespass. Neither would such applications for stay of proceedings be made, since a plaintiff would be a trespasser if he proceeded at all after the allowance of a writ of error. This shews that such allowance operating as a *supersedeas* is merely founded on the practice of the Court, and not on any general rule of law. Here the writ of error was not allowed till after the issuing of the *capias*, and the objection is, that the sheriff afterwards returned the writ, which it was his duty to do, unless prohibited by some other equivalent authority. But no notice is stated to the sheriff of such allowance, and he was not bound to take judicial notice of it, however the party in the cause may be so. Though even after notice the sheriff may return to the Court that he has done nothing under the writ. And according to *Hurst v. Cox*, 1 Blac. 393, the return and filing of the *capias* is mere matter of form; and by *Gee v. Fane*, 1 Lev. 225, the return may be filed even after the issuing of the *scire facias*. At any rate, the allowance of the writ of error is not of itself a *supersedeas*, but only becomes so by a rule of court, or by a writ of *supersedeas*. He then referred to Rast. 309. pl. 4, and Clift. 693, pl. 20. Precedents of writs of *supersedeas* to the sheriff on the ground of a writ of error allowed. Brev. Jud. 341. Fitzh. Na. Br. 239, E. Reg. 129, and many other precedents referred to in *Townsend's* tables. So the stat. 3 Jac. 1. c. 8, requiring bail in error recognizes the practice of issuing writs of *supersedeas*. [Lord *Ellenborough*. The words of that statute are "that no execution shall be stayed upon or by any writ of error or *supersedeas* thereupon to be sued, &c. unless," &c.; which shew that the Legislature recognized the staying of proceedings as well by the allowance of the writ of error itself as by the writ of *supersedeas*.] The writ of error allowed may stay the issuing of the writ of execution; but after the latter has issued, the writ of *supersedeas* is necessary to stay the execution and prevent the sheriff doing any thing under it. In the case cited from 2 Rol. Abr. 492, it appears that a writ of *supersedeas* issu-

ed after the writ of error to enforce the stay of proceedings. At any rate, as a writ of error does not of itself stay the proceedings in all cases, as in those included in the statute of James, unless *bail in error* be put in, it ought either to have been shewn that this was not a case in which bail in error were required, or to have been averred that bail in error had been put in, in order to make it operate as a *supersedeas*. And as the party has four days by the practice of the Court to put in such bail, at least the proceedings during those four days until the bail were put in are good. In *Lane v. Bacchus*, 2 Term Rep. 44, where the writ of execution was executed after the allowance of a writ of error before the four days were expired, and no bail in error were put in, the Court refused to set aside the execution. Besides, there is a great difference between the award of a writ and the actual execution of a writ awarded. Bro. Abr. Error, pl. 66. Here the record has never been removed: it is expressly so stated in the plea; and the writ of error being discontinued by lapse of time, there is nothing to prevent the Court from awarding execution.

LORD ELLENBOROUGH, C. J. It seems from the passage cited from Bro. Abr. to have been anciently the practice to sue out a writ of *supersedeas*, after the allowance of a writ of error; but I find no instance of this practice referred to since the stat. 3 Jac. 1, c. 8., and indeed from that period at least it must have been altogether unnecessary: for that statute says "that no execution shall be stayed upon or by any writ of error or *supersedeas* thereupon "to be sued, &c. unless," &c. which shews that either a writ of error (allowed) or a writ of *supersedeas* would have the effect of staying execution. That tallies, with the practice which has long prevailed of not suing out a writ of *supersedeas* after the allowance of a writ of error. And the case of *Perry v. Campbell*, 3 Term Rep. 300, shews that Lord Kenyon then expressly considered that the allowance and service of the writ of error was in itself a *supersedeas*. Shall we then overturn the whole practice of the Court, by saying that it shall not have that operation; but that it is necessary to sue out a formal writ of *supersedeas*, which it appears is never done? Here the bail by their plea in effect allege, that no *capias ad satisfaciendum* was returned against their principal, without which they cannot be made liable. Then it is said, that the allowance of the writ of error is no *supersedeas*, unless it be shewn that bail in error were put in in time, or that none were required. But if bail in error were not put in when required, that should have been shewn by the plaintiff in his replication; for, as it appears, the writ of error allowed is in general a *supersedeas*, and the statute only says, that it shall not be so in certain cases, unless, &c. therefore the party wishing to avail himself of the neglect in the particular case excepted should shew that.

LAWRENCE, J.(a) said he had always considered that the allowance of a writ of error was a *supersedeas*, and referred to Salk. 321, and *Cotton v. Daintry*, 1 Vent. 31, which latter had not been mentioned in the argument; where it is said, that though the sheriff shall not be in contempt if he make execution after the writ of error, if no *supersedeas* be sued out, for that he had no notice; yet the writ of error immediately upon the sealing forecloses the Court, so that the execution made after it is to be undone(1).

LE BLANC, J. declared himself of the same opinion.

Judgment for the defendant.

(a) Grose, J. was absent from indisposition.

(1) Vide *Phelps v. Landon*, 2 Day 37.

Williamson v. Allison.

2 East, 446. June 25, 1802.

In an action on the case in tort for a breach of a warranty of goods, the *scienter* need not be charged, nor if charged need it be proved.

THE declaration stated, that the plaintiff on 12th of May 1800, at London, &c. bargained with the defendant to buy of him twenty-four dozen bottles of claret, for the purpose of being forthwith exported by the plaintiff to the *East Indies*: and the defendant then and there well *knowing* the said claret to be in an unfit and improper state to be so exported as aforesaid, by then and there *falsely and fraudulently warranting* the said claret to be in a fit and proper state to be so exported as aforesaid, then and there *falsely, fraudulently, and deceitfully* sold the said claret to the plaintiff at and for a certain sum, viz. 78*l.* to be therefore paid, and which was afterwards paid to the defendant for the same, and which claret was afterwards exported in bottles by the plaintiff to the *East Indies* aforesaid: whereas in truth and in fact the said claret so as aforesaid sold by the defendant to the plaintiff, and so exported as aforesaid, at the time of the said sale and warranty thereof was not in a fit and proper state to be so exported, but on the contrary, was at that time new and in an unfit and improper state to be so exported; whereby the said claret fermented, and great part thereof became wholly lost to the plaintiff, and the rest of little or no value: and by means of the premises, the plaintiff lost great gains and profits which he would otherwise have made, &c. and was put to great charge and expence about the exporting and insurance thereof, to wit, at London, &c. and so the plaintiff in fact saith, that the defendant on the same day and year aforesaid, *falsely and fraudulently deceived him*, to wit, at London, &c. There were other counts, all charging the *scienter*, and the *deceit*: to which the defendant pleaded not guilty.

At the trial before *Lawrence, J.* at the sittings after last *Hilary* term at *Guildhall*, the warranty was proved, and also that the wine when it got to *Bengal*, was sour and unmarketable: but the plaintiff did not prove, nor did it appear probable from the evidence that the defendant knew that the wine was unsound at the time when it was delivered, but the misfortune was more likely owing to bad bottling or packing. It was therefore contended on the part of the defendant, that the plaintiff was not entitled to recover, inasmuch as there was no proof of the *scienter*, as laid in the declaration: but the learned judge being of opinion that the gist of the action was the warranty, and the *scienter* mere matter of aggravation, thought that the latter need not be proved, and directed the jury accordingly, who found for the plaintiff.

In the last term a rule was obtained, calling on the plaintiff to shew cause why the verdict should not be set aside, and a new trial had on the ground before suggested; and on reporting the evidence on this day, *Lawrence, J.* referred to a case of — *v. Purchase* at *Guildhall*, 6 Geo. 2., before Lord *Raymond, C. J.*, which was an action on the case for selling an unsound horse which was warranted to be sound, in which the *scienter* was averred in the declaration. But Lord *Raymond* was of opinion that the *scienter* need not be proved inasmuch as there was a warranty; and that the *scienter* was only necessary to be proved where the action was in the nature of an action of deceit without any warranty(a). He observed, however, that it did not appear from

(a) Vide *Springwell v. Allea*, Aleyn, 91, of which the following is a fuller note taken from a MS. in the hand-writing of Mr. Justice *Burnet*, in his collection of Lord *Hardwicke, C.* and his son the late Mr. *Charles Yorke*. — "In an action on the case for selling a horse as the defendant's own, when in truth it was the horse of *A. B.*, upon not guilty pleaded, it appeared that the defendant bought the horse in *Smithfield*, but did not take care

the note of that case, whether the declaration were in *assumpsit* or in tort; though he thought it more probable that it was in tort; as the practice of declaring in *assumpsit* in such cases was not common at that time.

Gibbs and Dampier, who were to have shewn cause against the rule, were stopped by the Court.

Brskine and Marryat in support of the rule, said, that unless the declaration in the case alluded to were in tort, the authority of it did not press upon the defendant: and in *Steuart v. Wilkins*, Dougl. 18, where this subject was much discussed, the practice of declaring in *assumpsit* in such cases was not considered as a novelty, it having been in use some time before, within the recollection of two of the judges (*Ashhurst* and *Buller, Js.*) who were considerable pleaders. In *assumpsit* upon an express warranty, the *scienter* is immaterial and irrelevant, and therefore need not be proved though laid. But in declaring in case for the deceit, though it may not be necessary where a warranty is stated to aver the *scienter*, according to *Chandler v. Lopus*,^(a) yet not being irrelevant to the deceit, which is there the gist of the action, it must be proved if laid. Here then the plaintiff having declared in tort, and having averred the *scienter*, which is the medium of establishing the fraud and tort, was bound to prove it. The issue of *not guilty* is joined on the deceit, and not on the *assumpsit* or warranty; the deceit, therefore, is not merely not irrelevant, but of the very essence of the declaration. They also referred to a late case of *Dowding v. Mortimer*, before Lord *Kenyon, C. J.*, where he was of opinion that the *scienter* was necessary to be proved^(b).

Of this last mentioned case it was observed by the plaintiff's counsel in answer, that it did not state any warranty, but was founded wholly on the deceit.

• Lord ELLENBOROUGH, C. J. The distinction between immaterial and irrelevant averments was well taken in *Bristow v. Wright*, Dougl. 665. That was an action on the case against a sheriff for taking the tenant's goods in execution without satisfying the landlord for a year's rent; and the plaintiff averred that the rent was reserved *quarterly*: whereas it turned out to be re-

to have him legally told. Yet as the plaintiff could not prove that the defendant knew it to be the horse of *A. B.* the plaintiff was nonsuited: for the *scienter* or fraud is the gist of the action where there is no warranty; for there the party takes upon himself the knowledge of the title to the horse and of his qualities."⁽¹⁾ See also *Chandler v. Lopus*, in the Exchequer-chamber, Cro. Jac. 4, to the same purpose. The same MS. also refers to another case; "So if a man sell six blank lottery tickets, and afterwards another as owner of these tickets recover them of the vendee; unless the vendor knew them to be the property of another or warranted them, neither this action (under title *Case of Tort in nature of Deceit and other Wrongs*) nor *assumpsit* for money had and received to the vendee's use will lie. Per Holt C. J. *Paget v. Wilkinson*, Tr. 8 W. 3. *Guildhall*." And see *Denison v. Ralphson*, 1 Vent. 366, where an opinion is given on the very point in question; for, on the second count, which stated a warranty that the goods sold were good and merchantable, and averred that the defendant delivered them bad and not merchantable, knowing them to be naught; the Court observe, that though the declaration be "knowing them to be naught," yet the knowledge need not be proved in evidence.

(a) Bull. N. P. 31, cited from Cro. Jac. 4.

(b) *Dowding v. Mortimer*. The declaration stated that the plaintiff, on 23th Jan. 1798, at, &c. bargained with the defendant to buy of him a certain musket as and for a sound and perfect musket, at and for a large price, viz. 2l. 12s. 6d., and that the defendant then and there knowing the said musket to be unsound, broken, and imperfect, then and there sold the said musket to the plaintiff as and for a sound and perfect musket at and for a large price, to wit, 2l. 12s. 6d. then and there paid by the plaintiff to the defendant, which said musket so sold as aforesaid was then and there at the said time of the sale thereof unsound, broken, and imperfect; and by means and in consequence thereof the said musket became and was of little or no use or value to the plaintiff, to wit, at, &c. and so the plaintiff in fact says, that the defendant on the day and year aforesaid, falsely and fraudulently deceived the plaintiff, to wit, at, &c. There were other counts to the like effect. Plea, *not guilty*.

(1) Vide *Bayard v. Malcolm*, 1 Johns. Rep. 453. *Seizas v. Woods*, 2 Chanc. 48. *Parkinson v. Lee*, ante, 314.

served yearly. There, if the whole averment as to the reservation of the rent had been struck out, the plaintiff could not have maintained his action, because some rent must necessarily have been averred to be due; and though it was unnecessary to have stated it to be reserved quarterly, yet the defendant was entitled to avail himself of the defect of proof in that particular. But here if the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit: and the form of the action cannot vary the proof in that respect. The ancient method of declaring was in tort on the warranty broken, and that was just going out of general practice when the case of *Steuart v. Wilkins* was discussed, because it was found more convenient to declare in *assumpsit* for the sake of adding the money counts. So general was the former method, that declarations in that form were familiar in every arrangement of precedents in tort. And the more modern practice of declaring in *assumpsit* in these cases has not prevailed generally above forty years. No other proof was required to sustain the former mode of declaring than the warranty itself and the breach of it. Here then the plaintiff will be equally entitled to recover in the tort upon the same proof, by striking out the whole averment of the *scienter*.

LAWRENCE, J. I retain my former opinion that the *scienter* was not necessary to be proved. The form of declaring in *assumpsit* in these cases is not of very ancient date, though Mr. Justice *Buller*, and before him Mr. Justice *Ashurst*, had often drawn declarations in that way in the course of their practice as pleaders. The case of *Steuart v. Wilkins* was the first wherein the question was regularly discussed, and that mode of declaring established: but even since that time I have myself drawn a hundred declarations on the same subject in tort. There are many precedents of that sort in the books, where a warranty is stated. Clift. Entr. 932, 4, 5, 6, and several others in the same book. Thomp. 40. 20. And these are not drawn as laying the *gravamen* on the deceit, as in the case alluded to of *Dowding v. Mortimer*, but on the warranty broken. Therefore, considering what has been the common practice of pleading, till of late years, I think it very probable that in the case before Lord *Raymond*, the declaration was in tort, and if so, it would be directly in point. With respect to what averments are necessary to be proved, I take the rule to be, that if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it: but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then though the averment be more particular than it need have been, the whole must be proved or the plaintiff cannot recover⁽¹⁾. This distinction was taken by Mr. Justice *Buller* in *Pipin v. Solomon*, 5 Term Rep. 496, where he takes notice of the case of *Bristow v. Wright*, and observes that it was there necessary for the plaintiff, in shewing that he was landlord, to set forth a contract between himself and the tenant, and that no part of the contract alleged could be struck out, being in its nature entire, and necessary to be proved as alleged. But in the principal case he said, that the averment (which was that the ship sailed *after* the making of the policy declared on,) did not arise out of the contract, nor was the contract, as alleged, made to depend upon it; and that if the averment there in question had been altogether omitted, the declaration would still have contained a perfect cause

(1) Vide 1 Chitt. Plead. 307. Day's edit. and the authorities there cited.

of action. So here, if the *scienter* be struck out altogether, the plaintiff may still maintain his action in tort on the warranty broken.

LE BLANC, J. The insertion or omission of the fact of the defendant's knowledge at the time, that the wine was unfit for sale, according to the warranty, makes no difference in the cause of action declared on, and therefore it may be struck out altogether: but in another form of declaring it may be made material.

Rule discharged.

Imlay v. Ellefsen,

2 East, 458. June 25, 1802.

No counter affidavit can be received in B. R. in order to contradict or do away the effect of an affidavit, to hold to bail, on the merits: and though such counter affidavit might be received to shew that the defendant had been before holden to bail for the same cause of action here, yet it will not avail to shew that he was before so holden to bail in a foreign country; at least where it did not distinctly appear that the defendant could have the same redress and benefit by the proceedings abroad as here. If a defendant be holden to bail under a judge's order upon an affidavit disclosing circumstances which shew that the plaintiff has been *damnified* to such an amount, it is sufficient, though it improperly state that the defendant was *indebted* to that amount, and disclose the special circumstances.

THE defendant, by leave of a judge at chambers, was holden to special bail upon the following affidavit:

"Robert Cowie of, &c. one of the trustees of the estate and effects of G. Imlay, under an assignment thereof in trust for his creditors, maketh oath and saith, that P. Ellefsen is justly and truly indebted to the plaintiff in 3000*l.* and upwards, being the value of certain bars of silver containing 13000 ounces or thereabouts, delivered by the plaintiff or on his account, in the year 1794, to the defendant to be by him carried and delivered, and by the defendant undertaken to be carried and delivered to E. B. of Gottenburgh in Sweden, for the use and on the account of the plaintiff; but which bars of silver, or any part thereof, the defendant hath not carried or delivered to the said E. B. at G. *aforesaid*, or to any other person or place for the use of the plaintiff. And this deponent further saith, that the said defendant hath ever since the receipt by him of the said goods, to this deponent's belief, been absent from England, and out of the jurisdiction of the courts of justice here, and hath lately come to England, but secretes himself for fear of discovery. And further, &c. that the defendant is a foreigner, resident in Norway, and is come to England for an occasional purpose only, and as deponent believes, will shortly depart this realm, and that unless he shall be holden to bail the plaintiff will be deprived of his legal remedy, &c.

Erskine in support of a rule for discharging the defendant on common bail, objected first to the sufficiency of the affidavit to hold to bail that it did not state any debt(a) owing from the defendant to the plaintiff, but at most only a misconduct of the former in not carrying the goods according to his undertaking. No perjury could be assigned if in fact the silver were the property of E. B. and he alone were interested in the loss: for there is no averment that the plaintiff had any property in it, or was *damnified* by the non-delivery: and an argumentative affidavit of debt or damage is not sufficient for holding another to bail. But 2dly, he relied on a counter affidavit by the defendant, whereby it appeared that the contract in question was made in France, for the transmission of the silver from thence, at a period when that was prohibited to be done by the laws of that country; and also that the defendant had been holden to bail by the plaintiff for the same cause of action in Norway, which suit was still depending. In support of the first of these latter grounds of ob-

jection he relied on *Melan v. The Duke of Fitzjames*, 1 Bos. & Pull. 138; where the Court of C. B. held that they were bound to take notice, when brought before them, of the law of the country where a contract was made, and by which its legality was to be judged. [But Lord *Ellenborough* signifying his dissent from that determination, which he observed was opposed by *Heath, J.*, one of the learned Judges of the Court at the time, *Erskine* abandoned that point(1).] He then relied on the pendency of the suit in *Norway*, on which the defendant had given bail. And observed, that though by the general rule of the Court no counter affidavit could be read against an affidavit to hold to bail; yet there were some necessary exceptions of which this was one. For it could not be denied that the fact of the defendant's having been before holden to bail for the same cause of action in the courts of this country might be brought before the Court by counter affidavit, and on the same ground of reason the fact now in question. The like was in daily practice in case of the arrest of married women, who after having been holden to special bail were discharged on counter affidavits.

Garrow and *W. Walton* shewed cause against the rule, and objected altogether to the reception of the counter affidavit of the defendant, as being contrary to the established practice of this Court, though admitted by *C. B.*: that it was in effect trying the merits of the cause on affidavit, and that too upon the deposition of the defendant himself. With regard to the objections arising on the face of the affidavit to hold to bail, they answered that it was first positively stated that the defendant was *indebted* to the plaintiff in 3000*l.* and it was afterwards shewn how the demand arose. And they referred to *Emerson v. Hawkins*, Wils. 335, and *Kirk v. Strickland*, Dougl. 449, and observed that the defendant having been holden to bail by leave of a judge who had exercised his discretion on all the circumstances of the case under the statute, the Court would be less inclined to interfere than in common cases where a plaintiff by his own discretionary act sets in motion the bailable process.

Lord ELLENBOROUGH, C. J. This is an application to the discretion of the Court: and to be sure, it would have been competent to the defendant to have shewn that he had been before holden to bail in this country for the same cause of action; because no man ought to be twice vexed for the same cause. But the question here is, whether we have presented to us with sufficient distinctness that the defendant stands in the situation of having been holden to bail in *Norway*, so that the plaintiff has the same security for his demand, and might have all the benefit of prosecuting his suit there which he has here. And as we do not see that such is the case, we do not feel ourselves warranted in taking from him the benefit he is entitled to from the laws of this country. Not knowing what the laws of *Norway* are in this respect, I cannot say that the plaintiff would have the same benefit from what has taken place there as he will have by the present proceeding. Then the question is on the conclusiveness of the affidavit to hold to bail as to the merits; and if that had not been already expressly decided in this Court in the case of *Emerson v. Hawkins*, 1 Wils. 335, and in *Smith v. Fraser*, 1 Blac. Rep. 192, where the Court refused to hear a counter affidavit read, I think the rule of practice of this Court is of such preponderating convenience that we ought to make such a rule in future. For otherwise we should have to try the merits of every case on affidavit, and it would be holding out great encouragement to defendants to commit perjury in relief of themselves from special bail. And this rule is as applicable and the mischief the same where a defendant has been holden to bail by a judge's order, as in ordinary cases under the statute

(1) The principle contended for by Mr. Justice *Heath* was expressly recognized by the Supreme Court of *New York* in *Smith v. Spinola*, 2 Johns. Rep. 200. See the editor's notes to the case of *Melan v. The Duke of Fitzjames*, 1 Bos. & Pull. 141, 2. (Day's edit.)

where a debt is positively sworn to. With respect to the objections taken to the affidavit itself, on which the defendant has been holden to bail; the deponent might indeed have used more proper terms to signify his damnification than by stating that the defendant was *indebted* to the plaintiff in so much; though the word *indebted* seems to have been used only to express the amount of the damnification, the manner of which is afterwards stated. However, if the real fact be conveyed to the judge making the order with such distinctness as for him in the exercise of his discretion to see that the plaintiff has been damnified to such an amount, and on which the deponent may be indicted for perjury if the facts be not truly stated, that is sufficient, though the affidavit might have been made in more formal terms. Besides, it does not appear to me to be so uncertain as is supposed, for the deponent swears to the value of the silver, and that it was to be delivered by the defendant to *E. B. for the use and on the account of Imlay*, by whom it had been before delivered to the defendant, and that the defendant has not delivered it, &c. Therefore, the affidavit to hold to bail is framed with sufficient distinctness and cannot be opposed by a counter affidavit.

Per Curiam,

Rule discharged(1).

Birt and Others Assignees of Glover, a Bankrupt, v. Kershaw.

2 East, 468. June 26, 1802.

An indorser on a note, who has received money from the drawer to take it up, is a competent witness for the drawer in an action against him by the indorsee to prove that he had satisfied the note; being either liable to the plaintiff on the note if the action were defeated, or to the defendant for money had and received if the action succeeded. And his being also liable in the latter case to compensate the defendant for the costs incurred in the action by such non-payment makes no difference.

THE defendant *Kershaw* being indebted to one *Wilby* in 14l. 10s. drew a bill of exchange on one *Wilkinson* in favour of *Wilby* or order, which the latter indorsed to *Glover*, whose assignees brought this action on the bill against *Kershaw* the drawer. And at the trial before *Grose, J.* at the Sittings, *Wilby* was called as a witness by the defendant to prove that whilst the bill was current, *Glover* having told him (*Wilby*) that the bill would not be paid by the drawee, *Wilby* paid the bill himself by settling it in account with *Glover*, in whose hands it was however left, and *Kershaw* paid *Wilby* the amount again. The competency of the witness (who had no release from *Kershaw*) was objected to on the ground of his interest as an indorser on the bill, and therefore coming to discharge himself from his liability; and *Grose, J.* inclined to admit the objection; but to save expence it was agreed to receive the evidence, on which the jury found a verdict for the defendant; and leave was given to the plaintiff to move to set that aside, and enter a verdict for himself for the amount of the bill, if the Court should be of opinion that *Wilby* was not a competent witness in this respect. A rule for that purpose having been obtained on a former day,

Erskine and *Littledale* now shewed cause, and contended that *Wilby* was interested, if at all, the other way. For if the present verdict were established, he was liable to be sued by the plaintiffs as indorser on the bill, and could not give this verdict in evidence, but must then prove the payment of the bill by other testimony than his own: but if the plaintiffs recovered, *Wilby* was

(1) The plaintiff neglecting to declare against the defendant in time he was discharged out of custody. Another suit was then brought on the same cause of action, and the defendant arrested a second time; and was again discharged. *Imlay v. Ellefsen*, 3 East 309.

discharged from his liability on the bill, and *Kershaw* could not sue him, because he had only received from *Kershaw* the amount once, for which he was originally indebted to him, and which as between him and *Kershaw* he was entitled to retain. But it would be sufficient if the witness stood merely indifferent between the parties, according to *Evans v. Williams*(a). The case of *Buckland v. Tankard*, 5 Term Rep. 578, does not apply, because that turned on the greater difficulty which the witness was supposed to be under of getting the money from the one party whom he came to favour than the other. Whereas here if the defendant succeed, it will be more easy for the plaintiffs to sue *Wilby* on the bill, in which action nothing more will be necessary to be proved than his hand-writing; than if the plaintiffs succeed it will be easy for the defendant to make out his case against *Wilby*. For this record would be no evidence for the present defendant in such an action against *Wilby*, being *res inter alios acta*, 5 Term Rep. 589. *Green v. New River Company*. [Lord *Ellenborough*. I think that is stated too generally. This record, supposing the plaintiffs recovered, would be evidence for *Kershaw* in an action against *Wilby* to recover back the money paid to him for taking up this bill, so far as to shew the fact that the plaintiffs had recovered the amount of the bill against the defendant. And even further, *Kershaw* might allege as part of the damage arising from *Wilby's* neglect to pay over the money which he received for taking up the bill, that he had been sued by *Glover's* assignees who had recovered the amount of the bill against him with costs.]

Garrow and *W. Walton*, in support of the rule insisted, that *Wilby's* condition was bettered by the evidence he had given; for at the most, if the verdict stand, *Wilby* will only be liable to be sued as indorser of the note, and that under the disadvantageous circumstance of the plaintiffs' having failed in their action against the drawer, on the ground of the bill having been satisfied. Whereas, if the plaintiffs succeed, *Wilby* will not only be liable to refund the amount of the note, the value of which he has twice received, once when he passed it to *Glover*, and afterwards again from *Kershaw*; but he will also be liable to make good to *Kershaw* the costs of the present action, to which he would be subjected by *Wilby's* fraud or negligence: and this record would be evidence against *Wilby* of the fact of such recovery.

LORD ELLENBOROUGH, C. J. It appears to me in a very simple and clear view of the case, that the witness stood indifferent between these parties. He must either be liable to the plaintiffs as indorser of the bill, or to *Kershaw* for the money received by him in order to discharge it. It is true; that in the latter case, if these plaintiffs recover he may also be liable to *Kershaw* for the costs of this action: but that argument was urged in *Ilderton v. Atkinson*, 5 Term Rep. 578, without effect. This record though evidence of the fact of such recovery, would not relieve *Kershaw*, in such an action against *Wilby*, from the proof of his having paid money to the latter, for the purpose of satisfying the bill. I know of no other than the case of *Buckland v. Tankard*, 7 Term Rep. 481, which goes on the ground of more or less difficulty in the witness in establishing his interest against one or other of the parties. But all the other cases go on the broad ground of interest in the witness: and as he seems to have stood indifferent as to the sum in dispute between these parties, I think his testimony was properly received.

GROSE, J. It struck me at the trial, advertng to the opinion of Lord *Kenyon* in *Buckland v. Tankard*, that the witness had an interest in giving the testimony he did, and that his condition would be bettered by it. But if his being liable over to the plaintiffs take away his interest and leave him indifferent, I agree that he ought to be heard.

(a) *Sittings at Guildhall* after Tr. 28 Geo. 3. cor. Lord *Kenyon* C. J. cited in *Ilderton v. Atkinson*, 7 Term Rep. 481.

LAWRENCE, J. This case falls directly within the principle of that of *Uderton v. Atkinson*. With respect to the amount of the bill in question, the witness stood indifferent between the parties; for if the plaintiffs recovered, *Kershaw* would be entitled to recover back the money which he had paid to *Wilby*, in order to satisfy this very bill, because he would then have paid the money twice. On the other hand, if *Kershaw* have a verdict, the plaintiffs may recover against *Wilby* on the bill, unless he can prove payment by legal evidence.

LE BLANC, J. Consider the situation of the witness without his being an indorser on the bill. He admits that he has received from one man a sum of money for a debt which he owed to another, in order to pay it over to that other. It is clear, then, that he must be liable either to the one or the other. And if the original debtor obtain a verdict by means of his evidence, he will be liable to be sued by the creditor, for whose use the money was received, and the verdict in this case will be no evidence of the payment for him in the other. Then how does it alter his situation that he is upon the bill? If the plaintiffs do not recover now they may sue him on the bill: and if they do recover, then by his own account he is answerable over to *Kershaw* (1).

Rule discharged.

The King v. The Bishop of Exeter.

2 East, 462. June 28, 1802.

Where no immemorial custom appeared to appoint a lecturer in a parish church, and on the contrary it appeared that the lectureship was founded in 1668, when the episcopal constitution was suspended, and consequently there could not be the joint assent of the bishop, the rector, and the vicar to the endowment, a *mandamus* to the bishop to licence a lecturer without the assent of the vicar was denied; though it appeared that the lectureship was originally endowed by the rector with an annual stipend payable out of the impropriate rectory, and that several lecturers had from time to time been accepted by the bishop and vicar for the time being.

A RULE was obtained in the last term calling on the defendant to shew cause why a *mandamus* should not issue commanding him to grant a licence to *John Rowe*, clerk, to be lecturer within the parish of *Fremington*, in the county of *Devon*.

The affidavit of Mr. *Rowe* stated, that *John Dodderidge* deceased, by his will dated 20th of *January* 1668, devised a rent charge of 50*l.* per annum, payable out of his rectory of *Fremington*, for the use of a lecturer within the parish of *Fremington*, for ever. That upon the death of the late lecturer in *January* 1795, *William Barbor*, in whom the rectory(a) was then vested, appointed the deponent by deed bearing date 16th *March* 1797. That lectures have been read in the parish church of *Fremington* and the annual stipend of 50*l.* regularly paid to the several lecturers pursuant to the will of *J. Dodderidge*, from his death to that of the last lecturer. That after the deponent's appointment, application was made to the bishop for a licence, which he refused, alleging as a reason that the present vicar of *Fremington* had ob-

(1) The general proposition, that a witness whose interest is equal in either event of the suit is indifferent and competent, has never been controverted: the only difficulty has arisen in the application. For cases in which the interest of the witness has been held to be equally balanced, see (besides the cases cited in the text) *Staples v. Okines*, 1 Esp. 332. *Pool v. Bousfield*, 1 Campb. 55. *Shuttleworth v. Stephens*, 1 Camp. 407. *Milward v. Hallet*, 2 Caines 77. *M'Leod v. Johnston*, 4 Johns. Rep. 126, 129. *Cushman v. Loker*, 2 Mass. Rep. 106. *Wise v. Wilcox*, 1 Day 22. For cases in which the witness has been held to have a preponderating interest on one side, see *Bland v. Ansley*, 2 New Rep. 331. *Maundrell v. Kennell*, 1 Campb. 408. n. *Owen v. Mann*, 2 Day 399. *Jackson d. Caldwell v. Hallenback*, 2 Johns. Rep. 394.

(a) It was an impropriate rectory.

jected to the deponent's using his church, and that he (the bishop) had determined not to grant a licence without the vicar's consent, although he allowed that he had no objection to the deponent as a clergyman, and that the testimonies he had received from him were complete. That in *Hilary* term 1793, upon the bishop's first refusal to grant the licence, a similar motion was made in this court for a *mandamus*, which went off in *Trinity* term following, upon a proposal made in court to recommend to the vicar to give his consent. That in *July* 1800, *W. Barbor* died and was succeeded by his brother *G. Barbor* as heir at law and devisee. That in *January* last the deponent applied again to the vicar for his consent, who refused to give it; in consequence of which the bishop also again declined to grant the licence.

Garrow and *Dampier* shewed cause against the rule upon the affidavit on which it was grounded; wherein it appeared, that the vicar refused his consent, which they contended was alone a sufficient reason in this case for the bishop to refuse his licence. No immemorial custom is sworn to, which alone can ground any right of admission to the use of the church without the vicar's consent. That was relied on by Lord *Mansfield* in *Rex v. The Bishop of London*, 1 Term Rep. 331, and adopted by Lord *Kenyon* in *Rex v. Field*, 4 Term Rep. 125. In the first of those cases indeed the lecturer was paid by voluntary contributions, and in the other he was paid out of the parish rates, which was relied on as decisive that it could not be an immemorial endowment. Now here the period stated when this lectureship was endowed (*anno* 1653) is decisive, not only that it is not immemorial, but that it could not have a legal commencement for want of one of the proper legal parties to assent to the endowment: for this, together with other sees in the kingdom, was then vacant. [This fact being objected to by the counsel on the other side as not being in the affidavit, Lord *Ellenborough* observed, that they might take notice that what was done then was at a period when the episcopal constitution was suspended.] It would be productive of great public inconvenience if every person who chose to dedicate a small freehold in a parish to the use of a lecturer could therefore appoint whom he pleased to preach in the parish church without the assent of the vicar, in whose discretion in the first instance, subject to the confirmation of the bishop, the law has reposed this confidence. By the same rule any number of persons might do the same, to the entire overthrow of all order and discipline in the church. [Lord *Ellenborough* said, that they need not labour that point, that no person could by compulsion, and at his option, engraft a lectureship on the church.] Then it is sufficient that the vicar refuses his assent, and he is not bound to assign his reasons, which may be very sufficient without affecting the moral character of the candidate.

Gibbs and *Wood* in support of the rule. The fund was stated in the affidavit in order to shew a legal endowment, without which there could be no claim. The bishop admits that there is no personal objection to the fitness of the candidate, and that it is the only satisfaction which the duty of his function requires him to demand: he has no concern with the right to the lectureship, as was said in the churchwardens of *St. Bartholomew's* case, 3 Salk. 87. The stat. 13 & 14 Car. 2. c. 4. s. 19, makes it necessary for the lecturer to have the bishop's licence, without which he is disabled from trying his right to the lectureship with the vicar, or recovering the stipend from the heirs of the donor: but the licence itself confers no right, and only puts the matter in a course of trial. The refusal of the vicar then to consent is not a sufficient ground for the bishop to refuse his licence. It has been said, indeed, that a rector may refuse the use of the church; but it has never been decided that a vicar has the same power of refusal. And though this lectureship were founded in the time of the usurpation, yet it has been since accepted by all the proper parties, and both the bishops and vicars for the time being have accepted persons to be lecturers. Besides, if the licence were granted,

it might be a question whether the lecturer would not be entitled to his stipend by lecturing at any place in the parish, though not in the parish church, according to the terms of the endowment.

LORD ELLENBOROUGH, C. J. What use might be made of the licence when granted is not material to be inquired into at present; the only question for us to consider now is, whether there be any legal title in the party applying to the thing sought to be obtained. Now it appears that Mr. Rowe has no legal title to the lectureship, which should call upon the Court to put the law in motion to enable him to obtain it. No legal custom is stated to appoint the lecturer to the use of the church without the consent of the vicar: and it is not competent to any person to engraft a lectureship by compulsion on the church; otherwise it might be done for the most capricious purposes, and in abuse of the regular institutions of the church, and might overthrow the whole establishment. Such a lectureship must have a legal commencement by custom or act of parliament. This cannot exist by immemorial custom, which the law presumes to have had a legal commencement, because it is traced to its commencement in 1658. And it could not then have had a legal commencement; because even if the bishop, the rector, and vicar, could, by their joint assent, engraft it on the church, there were no such persons then all existing having competent authority to accept the endowment on the part of the church. Lord Mansfield, in the case of the Bishop of London says, that no person can use the pulpit of a rector without his consent: that must mean a consent by the person who has the possession of the church, which appears here to be in the vicar. There being, therefore, no legal right in the present applicant, without which there can be no claim on the court to exercise its jurisdiction, I think we ought not to grant the application.

GROSE, J. It is sufficient to reject the application that the party has shewn no legal right to what he claims.

LAWRENCE, J. In *Rex v. The Bishop of London*, 1 Wils. 11, one ground on which the *mandamus* was refused was, that it would be nugatory to grant it: for (said the Court) it would be to no effect for them to grant a *mandamus* to the bishop to licence a lecturer when he had not obtained the consent of the rector; who had, notwithstanding such licence, a right to refuse him the use of the pulpit. So here it would be nugatory to grant this application when it appears that the vicar withholds his consent to the same purpose.

LE BLANC, J. The same doctrine prevailed in *The King v. Field*. There the *mandamus* did not issue, because there was no right in the party applying to do the thing for which the *mandamus* was prayed(1).

Rule discharged.

Frogmorton on the Demise of Fleming, Clerk, v. Scott, Clerk.

2 East, 467. June 28, 1802.

A rector may recover in ejectment against his lessee on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the stat. 13 Eliz. c. 20. And the lease to the defendant describing him as *Doctor in Divinity* produced by him at the trial in support of his title is *prima facie* evidence of his being such as he is therein described to be, so as also to avoid the lease under the stat. 21 Hen. 8. c. 13. s. 3.

THIS was an ejectment to recover the rectory of the parish church of Thornton, in the county of York, together with the parsonage-house, glebe and tithes, of which the lessor of the plaintiff was rector, and which had been demised by him to the defendant, by a lease dated the 1st of December 1792, made to the defendant, therein described to be *Doctor in Divinity*, to hold

(1) Vide *The King v. The Bishop of Oxford*, 7 East, 345.

from three years to three years, (if the lessor should so long live and continue rector), during the term of twelve years, at the yearly rent of 50*l*. At the trial at the last assizes at *York*, it appeared that the lessor of the plaintiff was the rector of *Thornton*, and made the lease in question to the defendant, Dr. *Scott*, who officiated as his curate in the parish; and that the rector had been absent from the parish for several years. Therefore, it was contended, that the lease was absolutely void by the stat. 13 Eliz. c. 20.

A verdict was taken for the plaintiff with leave to the defendant to move to set it aside and enter a nonsuit instead. And a rule *nisi* having been obtained in the last term for that purpose,

Wood now shewed cause, and contended that the lease was void; 1st. By the stat. 21 Hen. 8, c. 13. s. 3, which avoids all leases of any manors, lands, tenements, or hereditaments to a *spiritual* person, which the defendant appears to be by the designation of himself in the lease itself, being therein styled *Doctor in Divinity*. 2dly, By the stat. 13 Eliz. c. 20, whereby all leases of any part of a benefice are absolutely avoided immediately upon the incumbent absenting himself therefrom for the space of fourscore days in a year. Here the rector had discontinued his residence for a much longer period after the granting the lease in question. And it cannot be objected that there is a covenant in the lease that the rector shall not do any act to avoid it; for a covenant is no bar, whatever remedy may be had on it afterwards.

Erskine in support of the rule said in answer to the objection on the stat. of Hen. 8, that there was no evidence that the defendant was a spiritual person, though called so in the lease granted by the lessor. And as to the stat. of Eliz. that after the cases of *Doe v. Mears*, Cowp. 129, and *Doe v. Barber*, 2 Term Rep. 749, it could not be contended that the lease in question might not be avoided on account of the non-residence of the rector; but still it was not competent to the rector himself to set it aside by shewing his own breach of duty.

Lord ELLENBOROUGH, C. J. The stat. 13 Eliz. c. 20, expressly enacts, "that no lease to be made of any benefice, &c. shall endure any longer than "while the lessor shall be ordinarily resident and serving the cure of such "benefice, without absence above fourscore days in any one year, but that every such lease immediately upon such absence shall cease and be void." It is plain, therefore, that the legislature meant that the lease should be wholly cut down and done away by the non-residence of the rector. It was so considered in the case of *Doe v. Barber* even as against a stranger and wrong doer(a): therefore there is no ground for the distinction attempted to be taken between that case and the present. And I think the other ground of objection equally clear on the stat. 21 H. 8. The defendant is described in the lease itself, produced by him as a spiritual person.

Per Curiam,

Rule discharged.

Bilbie v. Lumley and Others.

2 East, 469. June 28, 1802.

Money paid by one with full knowledge (or the means of such knowledge in his hands) of all the circumstances cannot be recovered back again on account of such payment having been made under an ignorance of the law.

THIS was an action for money had and received, and upon other common counts, which was brought by an underwriter upon a policy of insurance in order to recover back 100*l*. which he had paid upon the policy as for a loss by capture to the defendants the assured. The ground on which the action

(a) But such lessee may maintain *trespass* upon his mere possession against a wrong doer. *Graham v. Peat*, ante, 1 vol. 244.

was endeavoured to be sustained was that the money was paid under a mistake, the defendants not having at the time of the insurance effected disclosed to the underwriter (the present plaintiff) a material letter which had been before received by them relating to the time of sailing of the ship insured. It was not now denied that the letter was material to be disclosed; but the defence rested on now and at the trial was, that before the loss on the policy was adjusted, and the money paid by the present plaintiff, all the papers had been laid before the underwriters, and amongst others, the letter in question: and therefore it was contended at the trial before *Rooke, J.* at *York*, that the money having been paid with full knowledge, or with full means of knowledge of all the circumstances, could not now be recovered back again. On the other hand, it was insisted that it was sufficient to sustain the action that the money had been paid under a mistake of the law; the plaintiff not being apprized at the time of the payment that the concealment of the particular circumstance disclosed in the letter kept back was a defence to any action which might have been brought on the policy: and the learned judge being of that opinion, the plaintiff obtained a verdict.

A rule *nisi* was granted in the last term for setting aside the verdict and having a new trial; which was to have been supported now by *Park* for the defendants, and opposed by *Wood* for the plaintiff. But after the report was read, and the fact clearly ascertained that the material letter in question had been submitted to the examination of the underwriters before the adjustment,

LORD ELLENBOROUGH, C. J. asked the plaintiff's counsel whether he could state any case where if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law? [No answer being given, his Lordship continued;] The case of *Chatfield v. Paxton*,^(a) is the only one I ever heard

(a) That case came before this Court on a motion for a new trial in M. 39 Geo. 3. The circumstances were so special, and there was so much of doubt in it that it was not thought to be of any use to report it. The outline of it was this: A mercantile house in *India* (of which the defendant was a surviving partner residing here at the time) received a bill drawn by the plaintiff on another house in payment of a debt, which bill the defendant's house made their own by laches; but not apprizing the plaintiff of this, they sent him back the bill protested for non-payment, and drew upon him for the same amount in favour of a mercantile house in *London* (some of whom, amongst others the defendant, were also partners in the house in *India*). The plaintiff, ignorant of the laches of the house in *India*, accepted the new bill; but before payment he received some information of the laches; yet not such particular proof of it as would have enabled him to defend himself against the demand upon his acceptance in a court (even if the house in *India* were to be considered the same as that in *London*). Therefore, the plaintiff paid his acceptance, and afterwards brought this action to recover the money back from the defendant as a partner in the house in *India*, and obtained a verdict under the direction of Lord *Kenyon*. Upon the motion for the new trial, his Lordship and *Ashurst, J.* were clearly of opinion that the action was maintainable; considering, as it seemed, that the defendant's house in *India* had obtained the plaintiff's acceptance in the first instance by a fraudulent concealment of their laches, and that the plaintiff had not voluntarily and with a fair knowledge of his case submitted to pay it; but had paid it from the necessity of the thing and under a protest, that if on his arrival in *India* he afterwards found his suspicions confirmed he should call upon the house there to indemnify him. *Ashurst, J.* added, that where a payment had been made not with full knowledge of the facts, but only under a blind suspicion of the case, and it was found to have been paid unjustly, the party might recover it back again. That here the plaintiff was under great uncertainty of the facts at the time he accepted the bill, and even if he knew them all before actual payment, yet that his knowledge would have come too late, and it would have been no answer to an action by the payees who were not parties to the transaction; but that his proper remedy was against those persons by whose misconduct he was placed in that situation. *Grose, J.* said he had great difficulty in adopting the opinion of the other two Judges to the full extent of it; principally because he was not satisfied that the plaintiff had not a sufficient knowledge of the ground of his defence before payment of the bill, whatever he might have had when he accepted it; but as the verdict was with the honesty of the case, he inclined against disturbing it; and the rather, because he doubted whether the house in *India* and that in *London* were to be considered as the same, so that the plaintiff could have resisted the payment of the bill to the latter, because one of their partners (the defendant)

of where Lord *Kenyon* at *nisi prius* intimated something of that sort. But when it was afterwards brought before this Court on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful at last on what precise ground the case turned that it was not reported. Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case. In *Lowrie v. Bourdieu*, Dougl. 467, money paid under a mere mistake of the law was endeavoured to be recovered back, and there *Buller, J.* observed that *ignorantia juris non excusat*, &c.(1).

Per Curiam,

Rule absolute(2).

Oddy v. Bovill.

2 East, 473. June 29, 1802.

Sentence of condemnation of a prize, taken by a *French* privateer and carried into *Spain*, by a *French* court sitting there, (*Spain* being then a belligerent ally of *France* in the war against *Great-Britain*) is valid; and such condemnation, proceeding on the ground of the property being enemy's and *British*, is conclusive in an action on a policy against the underwriter by the assured who had insured it as *Danish*, which in fact it was, *Denmark* being then *neutral*.

THIS was an action upon the case against the underwriter on a policy of insurance dated the 14th of *February* 1799, on a bottomry bond on the *Danish Shaw, Frow Anna*, upon a voyage at and from *Penzance* to *Genoa* for 200*l.* at a premium of 20 guineas *per cent.* Plea, the general issue. At the trial before *Le Blauc, J.* at the sittings at *Guildhall* after last *Hilary* term, a verdict was found for the plaintiff for 200*l.* subject to the opinion of the Court upon the following case.

That the ship *Frow Anna* was *in fact* a *Danish* ship, but was in the course of her voyage from *Penzance* to *Genoa* captured by a *French* privateer, and taken into the port of *Malaga* in *Spain*. That the captor instituted proceedings against the ship before the Consul of the *French Republic* residing at *Malaga*, who thereupon on the first of *April* 1799, at *Malaga* aforesaid, pronounced the following sentence.—“We *Nicholas Maurit, Champre*, consul of

was a partner in the other house, though he had no knowledge in fact of the laches. *Lawrence, J.* also doubted on the former ground, as the plaintiff seemed to have been apprised before payment of the general outline of his defence; but as he was not then so conversant of the particular facts now appearing as to have been able to resist the demand then made on him if an action had been brought, but seemed to have had only a confused notion of them, expecting to be better informed when he arrived in *India*, he doubted how far the maxim *volenti non fit injuria* could be applied to him.

(1) Whatever diversity of opinion may have existed among the civilians on this subject, [see 2 *Evans' Poth. Ob. Append.* 386.—407.] it is an ancient and well established principle of the common law, applicable in civil as well as in criminal cases, that a party may avail himself of his ignorance of fact, but not of his ignorance of the law. *Doct. & Stud.* 79, 152, 251. Hence if a party, through ignorance of fact, has either paid or promised to pay money which he was not liable to pay, he may recover it back, or refuse to perform the promise. *Goodall v. Dolley*, 1 *Term Rep.* 712. *Williams v. Bartholomew*, 1 *Bos. & Pull.* 326. *Donaldson v. Means*, 4 *Dall.* 109. *Crain v. Colwell*, 8 *Johns. Rep.* 384. *Garland v. Salem Bank*, 9 *Mass. Rep.* 408. But ignorance of the law merely is not a ground for the repetition of money voluntarily paid, or for avoiding a promise to pay. *Stelens v. Lynch*, 12 *East*, 38. Where there is no ignorance of fact, a promise to pay, whether made under a mistaken apprehension of the law or not, is a waiver of laches in the holder. See *Lundie v. Robertson*, 7 *East* 231, and the authorities cited in the Editor's note to that case, p. 236. In the late case of *Jones v. Morgan*, 2 *Campb.* 474, it was held, that a promise to pay by the indorser after the bill was due, was a sufficient admission of the acceptance stated in the declaration, as well as of the hand-writing of the defendant himself, and of the other parties to the bill.

(2) [See the learned Justice Story's chapter upon this head in the 1st vol. of his *Commentaries on Equity*, Ch. 5, title *Mistake—W.*]

"the *French* republic in the kingdom of *Grenada* in *Spain*, residing in *Malaga*, "authorized by the laws of 3d *Brunaire* (25th *October*.) and 8th *Floreal* (28th "April,) of the 4th year of the *French* republic, to give sentence, Whether "the prizes brought into any port belonging to this consulship, by any vessel "or privateer of the *French* republic, be lawful or not."—The sentence then recapitulates the case and proceeds as follows: "That so many motives united leave no doubt of the confiscation of the said vessel being lawful, as well "as on account of her being *English* property as on account of the offences "against the ordinances. That the cargo is of *English* growth and manufacture, and being besides proved *English* property by the piece of 13th page "already referred to, is also condemned, being on board a vessel which is *English* property—We therefore declare the vessel called *Frow Anna*, Captain "A. B., taken by the *French* privateer, *Le Zenodore*, Captain H. P., a good "prize, with her masts, &c. to the profit of the proprietors of the *Zenodore* "and her crew, and others interested in her, together with the goods, without "any exception, that compose her cargo; and order all guardians and trustees "to make the delivery of the same up to them; by which delivery we declare "the said guardians and trustees duly and lawfully discharged of their trust. "And we permit to the said proprietors of and persons interested in the *Zenodore*, or to those that have the power to procure the sales of the ship and "cargo in the chancery of the consulship of the *French* republic in this port, "charging them however to deposit the value in the said chancery, or in any "other public treasury in which they may be authorised so to do, till the allowed time of appeal be expired, or in case of appeal until the definitive "sentence, which, if it should be against them, they are to pay all the rights "and expences which might be done in consequence of the said sale, the lot "of live to the invalids, and others duties: also the law expences, and the expences of the present sentence of condemnation, which will be executed notwithstanding the rights of appeal; and intimated to all whom it may concern.—Done in the Consular House, and sealed with the national seal of "this consulship of *Malaga*, the 11th of *Germinal*, in the 5th year of the "*French* republic. (1st April 1797,) one and indivisible." "Signed, *Champre* "consul." That at the time of the capture and of the pronouncing of the aforesaid sentence the *French* and *Spaniards* were allies at war with this country, and *Denmark* was neutral. The question for the opinion of the Court was, whether the said sentence(a) were conclusive evidence that the warranty in the policy was not complied with. If it were not, the verdict to stand: if it were, a nonsuit to be entered.

Giles for the plaintiff contended for the negative. The principal question in effect is, whether by the law of nations a prize court can be established and exercise its functions in any other state than that to which it belongs and from which it derives its authority. That the prize court of a belligerent cannot exercise jurisdiction in a neutral country was clearly decided in the case of *The Flad Oyen*, 1 Rob. 135. Neither can it do so in the state of a co-belligerent for the same reason, because it is not warranted by the law and usage of nations. It is essentially necessary to have a known tribunal for determining whether a capture at sea be piratical or lawful; and though a neutral nation would on general reasoning appear to exercise this jurisdiction the most impartially, yet constant usage, which is the foundation of the law of nations, has long settled that the inquiry is to be made in the state of the captors, who are individually and nationally responsible for the act. This is expressly asserted in the Duke of *Newcastle's* letter to Mons. *Michell* (drawn up by Sir *Dudley Rider* and other eminent and well informed persons; 1 Mag. 482,) in answer to the *Prussian* memorial; and in the case of the *Flad Oyen*, Ib. 139, 140, Sir *W. Scott* considers that sentence of condemnation is

(a) Either party were to have liberty to refer, if necessary, to the sentence at large.

necessary to the validity of the captor's title, which sentence he says must be pronounced by a tribunal in the belligerent country. Now here the condemnation was by a court in *Spain* acting under the authority of *France*. But if the circumstance of their being co-belligerents against *England* cannot identify their respective territories, even considering the prize as a question of property between *English* and *French* subjects; still less can it do so as against a *Dane*, whose property the prize in fact was; because as to *Denmark*, *Spain* was a neutral country, within which it is settled that no such condemnation can take place. *Havelock v. Rockwood*, 8 Term Rep. 268.

The plaintiff's counsel was then proceeding to contend that the sentence of condemnation, admitting it to have been pronounced by a competent tribunal, was not conclusive as to the question of neutrality, which was collateral to the question of prize or no prize: but *The Court* said, that after the repeated determinations to the contrary, it would be nugatory to open that discussion again, especially upon a case reserved, on which there could be no appeal to the dernier resort.

Carr, contra, contended that co-belligerents had a union of territory against their mutual enemy, as for all purposes of war, of which the capture of prize was one. The question turns purely on the law of nations, of which prize courts have peculiar jurisdiction, and therefore this Court is bound to give credit to the decision of the prize court acting as such at *Malaga*, with the consent (as it assumes, and which is not disputed), of the sovereign power of the country. There is nothing inconsistent in this between two belligerent countries, as there is in such a compact between a belligerent and a neutral country; upon the ground of which inconsistency alone the judgment in the *Flad Oyen* case proceeded; because, as was properly there said, such a court sitting in a neutral country was an infringement of its neutrality with respect to the other belligerent whose property was captured and condemned there. But there is a union of interest, of defence and attack, between co-belligerents against their enemies; and as *Spain* could have ceded *Malaga* entirely to *France* at that time without infringing any duty which she owed to *Great Britain*, there was no reason why she should not have made a partial cession of her sovereignty for a particular purpose of war. Vattel, 2 book c. 7. s. 89, confirms the power of one nation to grant privileges of sovereignty to other nations within its own dominions. It makes no difference in this case whether the question be considered as between *France* and *Spain* and this country, or as between the two former and *Denmark*; their relative duties were the same; they were both inimical as to us, and both neutral as to *Denmark*. If this were the property of a neutral, it was equally tried by the law of nations, and he was equally secure of impartiality whether the question were tried in *France* or in *Spain*. He referred to Lord *Mansfield's* opinion in *Lindo v. Lord Rodney*, Dougl. 614, n. The sentence, however, has determined this to be *English* property, which is conclusive. The novelty of the case cannot prevent the application of the law of nations to it, which, though in ordinary cases it may be illustrated by usage and example, must, as it has often before happened, be drawn from first principles, as new circumstances and combinations arise in the world. That the law and practice of nations has in some respects varied very considerably is acknowledged by Sir *W. Scott* in the case of the *Santa Cruz*, 1 Rob. 69. But in the *Flad Oyen* case all the reasoning of the same learned Judge in shewing that the condemnation in a neutral country was invalid is founded on the distinction between a neutral and a belligerent country, and goes to prove that a condemnation in the country of a co-belligerent would be valid. No where is a capturing contradistinguished from a belligerent power. In the case of the *Christopher*, 2 Rob. 209, the condemnation in *France* of a *British* ship taken by a *French* privateer into a *Spanish* port, and then lying there, was holden valid. That cannot be distinguished in principle from the present case, and the grounds of

the judgment necessarily include it. It was contradistinguished only from the case of the *Flad Oyen*, because that was a condemnation in a neutral country, which had no common interest with the captors on the subject. And a case of the *Betsy Kruger*, 12th August 1800, lb. 210, n. is there referred to, where the legality of a condemnation like the present was expressly admitted by the Court, and was thought too clear to be contested by the advocates. The same principle has been since recognized in the case of *The Kierlighett*, 3 Rob. 96—9, and since that of the *Cosmopolite*, lb. 333, and must have been acted upon long ago under the stat. 4 & 5 W. & M. c. 25.

LAWRENCE, J. (a) The question is, Whether this sentence of condemnation be conclusive evidence that the property insured was *British*, and consequently that the warranty of its being neutral was not complied with? The argument was attempted to be carried into a wider field than we think it fit now to enter into since the case of *Hughes v. Cornelius* (b), and a long string of authorities which have followed that decision. We must now therefore take it for granted that if this sentence were given by a court of competent jurisdiction, it is conclusive upon the point then in judgment, namely against the neutrality of the property (1). The case of the *Flad Oyen* has been made the basis of the argument, to shew that unless the prize court were constituted according to the law and practice of nations, it could have no jurisdiction. If there were no other case on the subject determined by the same learned Judge, to explain how far he meant to go in that case, it might be doubtful from some expressions there used, whether it did not extend to a case circumstanced like the present: but if we look at his other decisions on this subject, particularly in that of the *Christopher*, though I do not mean to say that it is directly in point, it sufficiently appears from the reasons assigned by him in giving judgment, to what extent he meant the doctrine laid down by him in the *Flad Oyen* case should be understood; and that he did not intend to deny the legality of such sentences of condemnation by the captors in the country of a co-belligerent or ally in the war; because, as he observes, there is a common interest between such on the subject, and both governments may be presumed to authorize any measures conducing to give effect to their arms, and to consider each others ports as mutually subservient. This very question appears to have arisen in several subsequent cases, and in the case of the *Betsy Kruger* in August 1800, seems to have been considered by the advocates as so thoroughly understood and settled, that the question of law was waived, as one not to be discussed; and the court, proceeding on the ground that the condemnation was legal, directed further proof to be made of the fact of the transfer. We find then this question already determined by a court having peculiar jurisdiction in cases of this sort; of which we have only incidental jurisdiction. That determination, therefore, is as conclusive on us, as to the proper rule of decision, as a judgment of the common law courts on a question of real property would be on the civil law courts.

LE BLANC, J. The subsequent cases referred to are explanatory of the opinion delivered by Sir W. Scott in the case of the *Flad Oyen*, and shew that he considered that there was a material distinction between a sentence of condemnation pronounced by the authority of the capturing country in the state of a co-belligerent, and one so pronounced in a neutral country. Now this is the case of a sentence of condemnation in the country of a belligerent power, an ally of the captors, and is exactly like the cases of the *Harmony*, 2 Rob. 210, n. the *Adelaide*, and the *Betsy Kruger*. The first was a condemnation by the French commissary of marine at Rotterdam of a British prize taken and carried into *Helvoetsluys*, which was in the country of a belligerent

(a) Lord *Ellenborough* having been concerned in the cause gave no opinion, and *Grose, J.* was absent from indisposition.

(b) T. Ray. 473. Skin. 59, and 2 Show. 282.

(1) Vide *Bolton v. Gladstone*, 5 East 155, and the editor's note thereto, p. 162.

ally; which was so far considered as different from the case of such a court sitting in a neutral country, that the neutral claimant was directed to go into proof of the merits as to the transfer, reserving the question of law. And in the last-mentioned case of the *Betsey Kruger*, the point was considered to be so settled, that the advocates waived the discussion of it, and the Court considered the condemnation as legal. That I consider as a case directly in point to support the legality of a condemnation in the country of a belligerent ally. This Court, therefore, must decide the question consistently with the opinion of a court of peculiar jurisdiction on the same point, until we are told by a superior tribunal that that determination was improper⁽¹⁾.

Judgment of nonsuit.

Doe on the several Demises of the Duke of Norfolk and John Ibbotson v. Hawke and Another.

2 East, 481. June 29, 1802.

A. gave by will his tenant-right which he held by lease to *A. I.* but not to dispose of or sell it; and if he refused to dwell there, or keep it in his own possession, then that *J. I.* should have his tenant-right of the farm. *A. I.* having borrowed money left the title deeds with his creditor as a security, and confessed a judgment to secure the money; and having also given a judgment to another creditor who issued an execution against him, the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution: and *A. I.* having left the premises and ceased to dwell there on the day of the execution, before the sheriff entered: held that *J. I.* the remainderman was entitled to enter, the estate of *A. I.* having determined by such his acts.

ON the trial of an ejectment for a certain messuage and lands in *Yorkshire*, at the last *York* assizes, a verdict was found for the plaintiff on the demise of *John Ibbotson*, and for the defendants on the demise of the Duke of *Norfolk*, subject to the opinion of the Court on the following case.

Joseph Whiteley was lessee of the premises in question for the term of 21 years commencing from the 29th September 1799, under a lease granted to him by the Duke of *Norfolk*, dated 25th January 1790. *Whiteley* entered into possession of the premises under this lease, and made his will dated 10th October 1790, whereby he disposed of the premises in question as follows, "I give and bequeath to my nephew *Abraham Ibbotson*, with submission to the Duke of *Norfolk*, the tenant-right of my farm at the *Edgefield*, which I hold by lease under his Grace, he paying the rent and conforming to the covenants in the lease; but not to dispose of or sell the tenant right to any other person: but if he refuses to dwell there himself, or keep in his own possession, then my will is, that my nephew *John Ibbotson*, (one of the lessors of the plaintiff), shall have the tenant right of the farm at the *Edgefield*." And the testator directed (amongst other things) that the said farm should be delivered up as before willed a year and a day after his decease by his executrix: and he appointed his niece *Sarah Ibbotson*, sole executrix, and gave the residue of his effects to her. The testator *Whiteley* died in January 1799, having continued in possession of the premises till his death. The executrix married *Rowland Hartley*, and duly proved the will, and administration was granted to her, and she and her husband entered into the possession of the premises on *Whiteley's* death. And in February 1800, possession of the premises was duly delivered by them, together with the lease, to *A. Ibbotson*, in pursuance of *Whiteley's* will, and *A. Ibbotson* continued in such pos-

(1) In *Wheelright v. Depeyster*, 1 Johns. Rep. 471, it was decided by the Supreme Court of *New-York*, that the court of the sovereign of the captor is the only competent tribunal to decide on the validity of captures; and that such court can exercise jurisdiction only within the local jurisdiction of its sovereign or his ally.

session till he quitted the same as after-mentioned. When *A. Ibbotson* was in possession of the premises, *J. Crookes* lent him 25*l.* on his note of hand; and thereupon *A. Ibbotson* deposited with *Crookes* the lease of the premises as a further security. At the time of lending the 25*l.* it was agreed between *Crookes* and *A. Ibbotson*, that *Crookes* should have the first chance for the farm; but no actual valuation was made. *Crookes* made further advances to *A. Ibbotson*, amounting in all to 60*l.*; but *Crookes* knew nothing of *Whiteley's* will until the whole of the 60*l.* had been advanced. Afterwards, *A. Ibbotson* was arrested at the suit of *R. Hartley*, to whom he (*A. Ibbotson*) had given a warrant of attorney; and thereon *Crookes* paid for *A. Ibbotson*, at his request, 60*l.* more, to effect *A. Ibbotson's* liberation. After this *Crookes* took from *A. Ibbotson* a warrant of attorney to confess a judgment, and a bill of sale of *A. Ibbotson's* goods; but never entered up judgment on such warrant of attorney. Then one *William Greaves*, at *A. Ibbotson's* request, paid off the money advanced by *Crookes*, and took from *A. Ibbotson* a fresh warrant of attorney to confess a judgment; and at the same time the lease, and a copy of *Whiteley's* will, (which had been in *Crookes's* possession) were delivered by *Crookes*. Judgment was entered up on the warrant of attorney so given to *Greaves*, and execution thereon issued in Trinity term 1801; but before the entry with *Greaves's* execution, one *Joseph Schofield*, another creditor of *A. Ibbotson*, had levied an execution upon part of the goods of *A. Ibbotson*, which execution being satisfied by *Greaves*, was withdrawn, and possession was taken under his execution; and the lease of the premises in question was, on the 18th June 1801, publicly sold and assigned by the sheriff under *Greaves's* execution to the defendants, who were immediately put into possession of the premises, and now continue solely possessed thereof. *A. Ibbotson* quitted the premises in the morning before the sale, and has ever since ceased to dwell there, or have any possession thereof. *John Ibbotson* (the lessor of the plaintiff) attended at the time and place of sale (which was public), and before the actual sale gave notice of his claim under *Whiteley's* will to the defendants. The question was, Whether the plaintiff were entitled to recover on the demise of *John Ibbotson*. If he were, the verdict to stand; if not, a nonsuit to be entered.

Wood for the lessor of the plaintiff. The condition on which the farm was devised to *A. Ibbotson* was broken, and therefore *J. Ibbotson* was entitled to enter, to whom it was given over in the event of *A. Ibbotson's* refusing to dwell there himself, or keep it in his own possession. Here it is stated as a fact that *A. Ibbotson* quitted the premises on the day of the sale previous thereto, and has ever since ceased to dwell there, or have any possession thereof; and it appears from the rest of the case that he has parted with the power of dwelling there. The object, therefore, of the testator is entirely defeated, which was to compel *A. J.* to keep the farm in his own hands, or otherwise that it should go over to *J. J.* If it be objected, that the words of the condition only imply a voluntary refusal to dwell there, and not an absence by compulsion of law, as this will be contended to be, that is answered by the case of *Dammett v. Bedford*, 6 Term Rep. 684, where the condition was, that the annuity bequeathed should not be alienated by the devisee; otherwise it was immediately to cease and determine; yet upon his bankruptcy and the assignment of the annuity by the commissioners, it was holden to be determined, though that was no more a voluntary act of the bankrupt's than this. It is true, that in *Doe v. Carter*, 8 Term Rep. 57, it was at first considered that a taking of a lease in execution was not "a letting, setting, assigning, transferring, making over of it," &c. within the true meaning of those words, being done *in invitum*, and not a voluntary act: but when that question afterwards came on again in *Doe v. Carter*, Ib. 300, and it appeared that the warrant of attorney for confessing judgment, under which the lease was taken in execution, had been given for that express purpose, the Court held that it was a forfeiture of the lease, though ultimately taken by compulsion of law. The

same principle applies here; the facts of the case shew that *A. J.* borrowed the money on this specific security; for the lease was lodged with *Crookes*; that was a voluntary disposing of the lease; it was giving the creditor a specific lien on it, so that a court of equity would have compelled an assignment. But further, the parties had in view that the lease might be sold in satisfaction of the debt; for *Crookes* was to have the *first chance* for the farm. Afterwards, when the second warrant of attorney was given to *Greaves*, the lease was delivered over to him. Even in the first view of the case of *Doe v. Carter*, Lord *Kenyon* said, that if the warrant of attorney had been a *specific lien* on the lease it would have been a forfeiture.

Lambe, contra. The mere circumstance of *A. J.* quitting the premises on the morning of the sale, a few hours before, cannot vary the question; it was all one transaction referable to the taking possession of the premises by the sheriff under the execution. But in order to create a forfeiture, the *refusal to dwell, &c.* must be *voluntary*, and not a *ceasing to dwell by compulsion of law*. All conditions are to be construed strictly; and in the first case of *Doe v. Carter*, 8 Term Rep. 63, *Lawrence, J.* assigned the reason on which it was distinguished from *Domett v. Bedford*, 6 Term Rep. 684, because the intention of the devisor was that the annuity should only be paid as long as the devisee could receive it: and as he could have no property in it after his bankruptcy, it would be contrary to the will of the testator, to continue it. But the distinction was then taken between that and the case of a taking in execution, which was *in invitum*. There was no fraud intended here by depositing the lease or granting the warrants of attorney, in order to elude the condition of the will, by having the lease afterwards taken in execution. *Crookes* was even ignorant of the condition at the time when the money was advanced: and the execution was afterwards executed *in invitum* as much as in other cases. Whether the depositing of the lease with the creditor would have given a specific lien on it in equity is not material to be examined; because the Court will only consider whether the facts stated amount to an absolute forfeiture at law.

Wood, in reply, was stopped by the Court.

Lord ELLENBOROUGH, C. J. The terms of this devise are to be considered as a conditional limitation, in which the interest of *Abraham Ibbotson* in the premises is limited on certain events, on the happening of which it is given over to *John*. And the question is, Whether the acts of the party whose incapacity is to be incurred on his refusal to dwell on the farm or keep it in his own possession, have not determined his interest? When he deposited the lease with *Crookes* as a further security for the several loans of money advanced by him, was this not a voluntary act? and when the lease was afterwards delivered over to another creditor who took up the first demand, and to whom a warrant of attorney was at the same time given, and considering that by so giving up the lease he thereby disabled himself from mortgaging the premises, and by giving the warrant of attorney he enabled the creditor to dispossess him at his option, must he not be taken to have contemplated at the time the legal consequence of these acts which afterwards ensued? That these were voluntary acts there can be no doubt. He put the creditor in possession of the document of the farm; and by all the authorities he thereby gave a specific lien on the lease. For according to *Russel v. Russel*, 1 Bro. Chan. Cas. 269, and several other cases there mentioned, the making of such a deposit gives jurisdiction to a court of equity to compel a sale of the lease in discharge of the lien. As it then enables the other to turn the party out of possession in default of payment it shews a purpose in the latter to part with the possession, and therefore the subsequent proceeding and execution is not strictly *in invitum*, so as to bring the case within that of *Doe v. Carter*. And there need not be fraud in the transaction; it is enough if there be a manifest intention to depart with the estate, followed by acts to that end, which if not produced im-

mediately by the procurement of the party, may yet be said to be done with his assent. Upon the whole, therefore, it is enough to say, that here was a voluntary departing with the estate.

LAWRENCE, J.(a) The lease was given by the testator to *Abraham Ibbotson*, so long as he lived on the farm; the material words of the bequest are, "that he should not dispose of or sell the tenant-right to any other person: "but if he *refused* to dwell there himself, or keep it in his own possession," then it was to go over to the lessor of the plaintiff. Now the word *refused* is only a figurative expression; meaning if the first taker *ceased* to dwell there. There was certainly no occasion for any person previously to inquire of him whether he would reside there or not, and that he should expressly *refuse* it.

LE BLANC, J. This would be a strong case if it rested even on the first point; for here are strong circumstances to shew that this was a departing with the possession of the estate by the party's own act. Besides which, on the construction of the will it clearly appears to have been the intention of the testator that if *A. Ibbotson* ceased to live on the premises, or keep them in his own possession, they should go over to *John Ibbotson*.

Postea to the plaintiff

Thomas on the several Demises of Anne Jones and others v. Evans.

2 East, 488. June 29, 1802.

One devised his personal estate to *A.* and his real estate to *B.* and after *A.*'s death and the devisee having acquired other real property, some by devise and some by purchase, he made a second will disposing by name of his after-acquired testamentary estate to *C.* and then added "As to the rest of my real and personal estate I intend to dispose of it by a "codicil thereafter to be made to this my will." This is no revocation of the first will, whether considering that he meant to include the same property therein devised; because it is a mere declaration of an intent to dispose of it in future, and *non constat* that such disposition would be inconsistent with the first will: nor is it any revocation considering that he meant only to include his after purchased property not before devised, and his personal estate, the bequest of which had lapsed by the death of *A.*

IN ejectment, tried before *Thomson, B.* at the last *Hereford* assizes, a verdict was found for the plaintiff subject to the opinion of the Court on the following case.

Richard Philipps being seised in fee of the premises in question, and also possessed of a considerable personal estate, by will dated 20th *February* 1801, duly executed and attested, devised the same as follows. "This is the last will and testament of me *R. P.*" &c. "I give and devise all and singular my real estate wheresoever situated in the county of *Carmarthen* and the borough of *Carmarthen* to my mother *Jane Philipps* and her assigns, for life, without impeachment of waste; and from and after her decease I give and devise unto my sister *Ann Jones* an annuity of 20*l.*, to be yearly issuing out of my said real estate during her life, clear of all deductions (with a power of distraining for it in case of default). I give and devise all my said real estate in possession or reversion to *T. L.* and *G. P.* and their heirs, in trust, to the use of my nephew *John Jones*, only son of my said sister, and his assigns, for and during his life, remainder to my said trustees and their heirs to preserve contingent remainders: remainder to the first and every other son and sons of the body of my said nephew *John Jones*, and the heirs of their bodies, &c. (successive); and in default of such issue to the use of all and every of the daughter and daughters of the body of the said *John Jones*, and the heirs of their bodies, &c. as tenants in common; and in default of such issue I give

(a) *Gross, J.* was absent from indisposition.

and devise all my said estate to my cousin *T. Philipps*, second son of my uncle *W. Philipps* of *Slebatch*, &c. clerk, his heirs and assigns for ever. As to all and singular my personal estate, I give and bequeath the same to my mother *Jane Philipps*, whom I do appoint sole executrix of this my will; and I do hereby revoke all former and other will and wills."

Jane Philipps, the mother and devisee for life, and also executrix and residuary legatee named in the will, died in *February 1784*, in the lifetime of the testator. After the making of the will, one *George Philipps* devised to the testator a certain estate called the *Coedgain* estate for life, with several remainders over, with the ultimate reversion to his the said *George Philipps'* own right heirs; and died on the 20th *April 1784*; after whose death the said reversion in fee expectant as aforesaid descended and came to the said *Richard Philipps* as cousin and heir at law of the said *George Philipps*. The said *Richard Philipps* being so seized of the premises which he had when he made the will of 1781, and also of the said life estate in the *Coedgain* estate of which he was likewise entitled to the reversion in fee as aforesaid, made another will in writing dated 7th of *March 1785*, duly executed and attested, in the words following: "This is the last will and testament of me *R. P.* &c. Whereas my relation *George Philipps* of *Coedgain* aforesaid, deceased, did by his last will and testament, duly executed, give and devise all his real estates in the several counties of *Carmarthen* and *Cardigan* and county of the borough of *Carmarthen*, (subject to the annuities therein granted,) to me the said *Richard Philipps* for life, remainder to *Richard Mansel*, second son of *Sir William Mansel* of *Iscoed* in the county of *Carmarthen*, Baronet, in tail, with other remainders over, and the reversion thereof to his own right heirs for ever: and whereas I the said *Richard Philipps* am thereby entitled to the reversionary estate and interest expectant on the estates tail of and in the said real estates as heir at law to the said *George Philipps*; Now I do by this my will give and devise all my reversionary estate and interest of in and to the said premises so devised to me in manner aforesaid by the said *George Philipps*, deceased, to Dame *Mary Mansel* the wife of the said *Sir William Mansel*, her heirs and assigns for ever. As to the rest of my real and personal estate, I intend to dispose the same by a codicil to this my will hereafter to be made. In witness whereof," &c.

Richard Philipps died 7th *October 1792*, unmarried, leaving *Anne Jones* widow, one of the lessors of the plaintiff, his sister and heir at law and next of kin, *John Jones* her son and devisee named in the will of 1781, and *Thomas Philipps* the ultimate remainder man in such will named, him surviving. The wills of 20th *February 1781* and of 7th *March 1785* were both found uncancelled, and have both been duly proved. *John Jones* the devisee for life under the will of 1781, on the decease of the said *Richard Philipps* in 1792, entered into possession of the premises in question, and so continued till his death on the 23d *June 1796*. The testator subsequently to the making the will of 1781, and before he made that of 1785, bought an estate, the consideration paid for which was 150*l.*: and subsequently to the will of 1785, he purchased an estate of the yearly value of 150*l.*, which last estate descended to the said *Ann Jones* as his heir at law. The question for the opinion of the Court was, Whether the will of 1781 were revoked by the will of 1785?

Phelps, for the lessor of the plaintiff, contended in the affirmative. It is a question of intent, reference being had to the circumstances of the deviser at the several times. In making the second will, he must either have intended to confirm or revoke the first: but he could not have meant a confirmation of it, because taking them both to bear date in 1785 there is a repugnance and inconsistency in them in several particulars; for his mother, to whom he had devised a life estate by the will of 1781, was dead at the time of making the will of 1785. And to her who was then dead he must be supposed to have

bequeathed all his personal estate absolutely, and also to have intended to constitute her sole executrix, an intention too absurd to impute to him. But as a revocation of the first, the second will is a perfect and consistent instrument; for therein after disposing of his recently acquired estate, he declares his intention to dispose of the *rest of his real and personal estate* by a future *codicil to that his will*. That he did not make such future disposition is immaterial: it is enough that he thereby shewed a present intention that the first will should be revoked. He must have known that by the intervening death of his mother the whole of his *personal estate* was undisposed of, and he declares his intention as well in regard to that as to the rest of his real estate in the same clause; and the future codicil of which he speaks is to be annexed to *that his will*; disregarding altogether the first will; and calling the will of 1785 his *last will*.

Williams, Serjt., contra. Revocations of wills are not to be favoured: and no intention to revoke can be presumed from making a subsequent will not inconsistent with the former, especially with respect to such parts as may well stand together. The occasion of making the second will is plainly expressed in it, namely, to dispose of the devisors after acquired property, which he mentions by name. And according to *Coward v. Marshall*, Cro. Eliz. 721, two wills disposing even of the same land may be construed together, unless they are inconsistent. That case was recognized by Lord Hardwicke in *Willet v. Sandford*, 1 Ves. 187, and in the Attorney-General v. *Heywood* in July 1741. Then the mere circumstance of declaring that he meant to dispose of the rest of his real and personal estate by a future codicil does not shew a present intention in the devisor that the disposition he had before made should be immediately annulled. Admitting that he intended at some future time to make a codicil disposing of the property in question differently from what he had done in his first will, and thereby to annul it, it does not follow that he meant to do so by any other instrument than such codicil; and as he lived several years afterwards without making it, it shews that he was satisfied to abide by what he had already done. At most, it only amounts to an intention to revoke never carried into effect. The statute of frauds points out the several ways in which *express* revocations of wills can alone be made. But what would not have been a revocation by parol before the statute, will not be so since, though reduced into writing with all the formalities enjoined by the statute. Now a bare *intention* to revoke, though expressed by parol, was no revocation before the statute, unless the testator declared that he *did revoke* his will. It was so resolved in *Crandel v. Sanders(a)*. And this is no more than expressing an intention to revoke it by some future instrument. But until the codicil were made how can the Court say whether it would be a revocation or confirmation of the will: the making a codicil does not in itself shew a disposition to revoke a prior will. Supposing the testator had even made a codicil the contents of which could not be known, but it was only found to have contained a different disposition of the property, yet the Court could not adjudge it to be a revocation of the will, without seeing the contents. *Hutchins v. Basset*, 2 Salk. 592. 1 Show. 637. 3 Mod. 203. Show P. C. 146, and *Harwood v. Goodright(b)*. In the latter case in C. B. three Judges went the other way, but their opinion was over-ruled on a writ of error in this Court, which judgment was afterwards affirmed in Parliament. But admitting that some effect must be given to the words, stating that as to the rest of his real and personal estate the devisor meant to make a future dispo-

(a) Cro. Jac. 497, and vi. Moor, 874.

(b) Cowp. 87, and vide not (1) to Mr. Cox's edit. of P. Wms. 1 vol. 345. Vide S. C. in C. B. 8 Wils. 497, and 2 Blac. 987, and in Dom. Proc. 7 Bro. P. C. 344, where the judgment of B. R. reversing that of C. B. was affirmed.

sition of them, they need not relate to the real property devised by the first will; for besides the property which had come to him by the death of his relation, and which he distinctly disposed of by the second will, he had other property undisposed of by the first will which he had subsequently acquired by purchase, which sufficiently explains the use of those words. Then as to the expression of his *last* will, it was said by the Court in the late case between Lord *Walpole* and Lord *Cholmondeley*, 7 Term Rep. 144—151, that no reliance could be placed on it; for that was a man's last will which was confirmed by law to be such at the time of his death.

Phelps in reply, said, that the residuary clause was not confined to after purchased property, but extended to all: and furnished evidence as to the deviser's intent that his first will should stand annulled *in toto*, independent of the question of the revocation, arising from evidence of an intention to revoke by making a different disposition. That in the case of *Harwood v. Goodright*, there was not sufficient evidence to shew an intention to revoke, because the Court could not see *in what respect* the subsequent disposition differed from the first. But there may be a revocation without any new disposition.

Lord ELLENBOROUGH, C. J. This is as clear a case as ever came before the Court. A person made his will, whereby he bequeathed his personal estate to his mother, and after several intervening limitations, devised the ultimate remainder of his real estate to *T. Philipps*. He afterwards acquired a new reversionary estate, which he also wished to dispose of; and his mother having in the mean time died, and consequently the bequest of his personal property having lapsed, and having also purchased other real estates which he had not before disposed of, he might also contemplate the disposition of those. So circumstanced he makes another will, which he describes as his *last* will, on which stress is laid; and so indeed it was his *last* will, with regard to his newly acquired property. But it is not enough to say, that by making this will in terms large enough to include all his property, he must therefore have meant to revoke the former will; unless it be shewn that he has made a disposition of the same property inconsistent with it: especially since the case of *Harwood v. Goodright*, and that of *Hutchins v. Basset*. It is said, that he must have intended either to confirm or revoke the dispositions contained in the first will; but there is a third proposition; he might not have contemplated to do either, but to make a mere collateral disposition of other property; and that seems to have been the case. The cases referred to before the statute of frauds, wherein parol declarations of an intention to revoke in future were holden not to amount to a present revocation, are all applicable. The only difference introduced by that statute, was to require certain formalities in the making and revoking of wills: but the same sense conveyed now in writing as before the statute might have been conveyed by parol, will have the same operation. Even in some cases, where the subsequent disposition somewhat varied from the prior one, it was holden only a revocation *pro tanto*, and that the two instruments might in other respects stand together. All these were fully considered in the cases I have mentioned; and the cases have gone this length, that if it be merely found that *another*, or even a *different* disposition has been made by the testator from that which he had first willed, yet if it do not appear to the Court what that difference is, it is no revocation. Here the deviser has concluded by declaring his intention to dispose of the rest of his real and personal estate by a codicil thereafter to be made to that his will: the plain sense of which is that instead of having two distinct instruments, he meant to dispose of his personal property, the bequest of which had lapsed by the death of his mother, and also of his real property, which he had acquired subsequent to his first will, and by means of a codicil to connect the two instruments and make it all one will. But even if this had imported an intention to revoke by making a different disposition in future, it would not, according to the authorities, have amounted to a revocation, unless we knew

what the difference was. And after the cases which have been decided, it is impossible to agitate one so infinitely weaker than many of those, and to contend that the prior disposition was revoked in this case.

LAWRENCE, J. The circumstances relied on to shew that the subsequent instrument was a revocation of the former are, 1st, That the testator calls it his *last* will : to which the true answer was given at the bar, that it is merely a word of form, and he meant no more by it than that it was the last of those instrument which he had executed. Then 2dly, stress is laid on the declaration of his intention to dispose of the rest of his real and personal estate by a codicil thereafter to be made ; from whence it is contended, that he must have considered all the rest of his property as undisposed of, besides what he had devised in the prior part of the second will. But it would not be inconsistent with the disposition in the first will, if in speaking of the residue he had meant to include the same property that he had before devised ; for he only says, that he intended to dispose of it by a future codicil, and *non constat*, whether he would make any or what difference in the disposition he had before made. It does not, however, appear that he meant to include the same property in the residuary clause ; for he had other property, both real and personal, undisposed of by either of the instruments, namely, his personal property which had lapsed by the death of his mother, and real property purchased by him after the date of his first will, which alone he might have intended to dispose of by a future codicil. In neither case, therefore, is the declaration of such intent inconsistent with the disposition made by the first instrument.

Per Curiam,

Postea to the defendant.

The Company of Proprietors of the Mersey and Irwell Navigation v. Douglas and Others.

2 East, 497. July 1, 1802.

It is not necessary to give a local description to the nuisance in an action for diverting the water of a navigation ; and therefore if it be doubtful whether the place where such navigation is stated to lie, be laid in the declaration as a venue or as local description, it will be referred merely to venue, and need not be proved to be at such place ; but it is sufficient if it be at any other place within the county.

THE declaration stated, that the plaintiffs heretofore, to wit, on the 1st of January 1796, to wit, at *Preston in the county of Lancaster*, were proprietors of and lawfully entitled to, and from thence hitherto have been and still are proprietors of, and entitled to the free navigation of a certain river there called the *Irwell*, the water of which said river hath flowed, and ought to have flowed, and from time immemorial until the obstruction hereinafter mentioned, hath flowed in its ancient and accustomed course, without any obstruction to the said navigation of the said company : yet the defendants well knowing the premises, but contriving and fraudulently intending to prejudice the plaintiffs, and to disturb them in the enjoyment of the navigation of the said river called the *Irwell*, and to damnify them in the same, to wit, on the day and year aforesaid, at *Preston aforesaid*, in the county aforesaid, wrongfully, and injuriously erected, and caused and procured to be erected, in, over, and across, the said river, above the said navigation of the said company a certain weir or dam, &c., and wrongfully and injuriously kept and continued the same *so there erected*, for a long space of time, &c., and thereby and therewith wrongfully and injuriously penned up and obstructed the water of the said river, and prevented the same from flowing down to the said navigation of the said company, in as ample and beneficial a manner as the same otherwise would, &c. in consequence where-

of the plaintiffs were prevented from navigating their vessels, &c. and lost great profits, &c. and expended large sums in forwarding of goods by other means than in the said vessels, &c. to wit, at *Preston* aforesaid, in the county aforesaid. There were other counts in substance the same. The last count stated, that whereas the plaintiffs heretofore, to wit, on the said 1st of *January* 1796, and long before, were proprietors of and entitled to, and from thence hitherto have been, and still are proprietors of and entitled to the free navigation of a certain other river there called the *Irwell*, the water of which said river hath flowed, &c. from time immemorial until the obstruction after mentioned, in its ancient and accustomed course, without any obstruction or impediment; yet the defendants well knowing the premises, but intending to prejudice the plaintiffs, and to disturb them in the enjoyment of the navigation of the said river called the *Irwell*, &c. to wit, on the day and year aforesaid, at *Preston* aforesaid, in the county aforesaid, wrongfully and injuriously *penned up and obstructed the water of the said last-mentioned river*, and prevented the same from flowing in as ample and beneficial a manner as the same otherwise would, &c. concluding as before. The defendants pleaded the general issue.

At the trial before *Rooke, J.* at *Lancaster* the plaintiffs were non-suited for default of proving that the river *Irwell* was at *Preston*: and a rule *nisi* having been obtained for setting aside the nonsuit and granting a new trial, cause was now shewn against it, by

Park, Holroyd, and Scarlett. Though the action be personal the injury is local, as well with respect to the injurious act done, as with respect to the property injured, which is real. And by *Comyns*, 1 Com. Dig. tit. Action, 131, n. 5, every action founded upon a local thing shall be brought in the county where the cause of action arises. Where the injury is to land, it must be laid in the proper parish or vill as well as county, as in trespass *quare clausum fregit*. Then unless the word *there* be taken as descriptive of the place where the injury was committed, and refer, as it necessarily does, to *Preston*, the declaration would be bad: and if it do so refer, it ought to have been proved as laid; though alleged under a *viz.* being a material allegation. [Lord *Ellenborough*. If it be necessary that the nuisance should have a local description, and this be not locally described, the remedy must be sought in another form, and not upon a motion for setting aside a nonsuit on a supposed defect of proof of the allegation of locality.] Upon a motion in arrest of judgment, it would be contended that the word *there* did refer to *Preston*, and amounted to an allegation that the *Irwell*, in which the nuisance is charged to have been committed, was at *Preston*. [Lawrence, J. Suppose the word *there* was struck out, and the declaration ran thus: that the plaintiffs at *Preston* were possessed of a certain river called the *Irwell*, &c. how would that be defective?] If it did not appear where the river was, it would be sufficient for the plaintiff to sustain his declaration by proving that the river was in another county, which would do away the admitted locality of the action; but in *Goodright v. Strother*, 2 Blac. 706, on a motion in arrest of judgment in ejectment, for want of an allegation of the vill where the lands lay; it appearing to be alleged that the defendant *at H.* ejected the plaintiff from the said lands, that was holden to amount to a sufficient certainty that the lands lay there. If it would not have been enough before the statute 4 & 5 Ann. c. 16, which enabled the jury to come from the body of the county, to have laid the action in the proper county, without naming the particular vill, nothing in that statute has superseded the necessity of the proof required here. They also mentioned a case of *Shaw v. Wrigley* and others, before *Wilson, J.* at *York*, Summer assizes 1790, which was an action on the case for a nuisance in erecting a weir, and thereby injuring the plaintiff's mill, which weir was described in the declaration to be at the *Hulbrook*, but was proved in fact to have been erected at a lower part of the same water, called the *Tame* water;

on which the plaintiff was nonsuited, and the Court of B. R. afterwards refused to set aside the nonsuit.

Erskine, Gibbs, Wood, Lambe, W. Walton, Raine, and Yates, in support of the rule. Admitting that if the declaration alleged as matter of local description, that the river *Irwell* was at *Preston*, it must be so proved, the question here is, Whether if the word *there*, be taken to refer to *Preston*, it shall be taken to refer to *venue*, or to *local description*? Now, if venue only were necessary, the Court will not read it as local description for the purpose of nonsuiting the plaintiff, but will rather intend that he stated enough, and not more than was necessary to sustain his action. The allegation is found in that part of the declaration where the venue is usually placed; and it is absurd to suppose that the plaintiffs would allege as matter of description, that the whole of an extensive line of navigation, vested in them by a public act of parliament, was situated at *Preston*, otherwise than as mere matter of form. What constitutes this a local action is the locality of the plaintiff's possession within the body of the county, and not the locality of the injury in this or that part of it. If, before the stat. of Anne, it would have been necessary to have stated the particular vill, &c. it is no longer so since the statute, unless where local description is necessary. Part of this navigation is in the county of *Chester*, and though the injurious act had been done there, yet if the injurious consequence to the plaintiff's possession were felt in *Lancashire*, the action was properly brought there. There are three material facts alleged, to which it was proper to lay a venue: 1. That the plaintiffs were lawfully possessed of the navigation described to be injured. 2. That the defendants wrongfully set up a weir across that navigation; and 3. That the plaintiffs were thereby injured. No local description was necessary, but it was sufficient that the gravamen arose within the county. In cases where a specific judgment is to be given for an abatement of the nuisance, there certainty in the local description is necessary, as in an assize of nuisance, or a *quod permittat*, or an indictment for a nuisance. It need not even have been stated, by what means the defendants diverted the water, and the injury was affected; *a fortiori*, therefore, it was unnecessary to give a local description to the injury. It would have been enough for the plaintiffs to have stated their possession of the navigation at any place (by way of venue) within the body of the county, and that the defendants *above* the navigation of the plaintiffs *diverted(a)* the water, whereby their navigation was obstructed. If, indeed, a wrong name had been given to the river, it might have been a ground of objection, as in the case before *Wilson, J.* at *York*: but the place where the injury was committed is quite immaterial, as in *Drewry v. Twiss*, 4 Term Rep. 558, *Frith v. Gray*, there mentioned, and *Harrison v. Rock*, 3 Bulstr. 334, in which latter, in an action on the case for stopping the plaintiff's right of way, one of the objections was, that it was not stated in what town the way was; but it was over-ruled. They also referred to the last court as more general than the others.

LORD ELLENBOROUGH, C. J. This action is in its nature confessedly local: but the question is, whether the gravamen need be described with any local certainty; and I incline to think it need not; but that it is sufficient if it be laid at any place within the body of the county. A plaintiff in such an action may indeed make it necessary to prove the gravamen in a particular place by giving it a specific local description; as by alleging the nuisance to be standing and being at a certain place particularly described; but in general such particularity is not necessary. For otherwise, how is a venue to be laid to the fact of the obstruction, when that takes place in the higher part of a stream flowing in one county, and the injury is sustained in the lower part of

(a) Vide *Prickman v. Tripp*, Skin. 389.

the same stream in a different county in which the action is brought? It is sufficient to describe the substance of the injury in order to give the other party notice of what he is to defend, and it is sufficient in the form of pleading to allege the gravamen at any place within the body of the county. Therefore, the manner in which it is here stated ought rather to be referred to venue than to local description. If indeed local description were necessary to be laid in this species of action, it might be doubtful whether this manner of laying it were to be referred to the one or the other; but that question would have been better brought before the Court on demurrer, and need not be now considered; though I do not think it necessary to be so laid.

LAWRENCE, J. (a) The ground of the nonsuit at the assizes was on the want of proof of the first allegation in the declaration, that the plaintiffs at *Preston* were proprietors of and entitled to the navigation of the river there called the *Irwell*; it appearing that there was no such river at *Preston*, to which it was supposed to be confined as matter of description. Now there is no occasion for referring the word *there* to *Preston* as matter of description that the river *Irwell* ran at *Preston*, for the purpose of a nonsuit, when it may be rendered intelligible by reading it in another sense which will support the declaration; and I think it may well be referred to the *calling* of the river the *Irwell*, at *Preston*. Then the question is whether in this form of action it be necessary to give with certainty the local description of the nuisance complained of; for if so, we must consider *Preston* as the local description of the place where the nuisance was committed: but I think it was not necessary so to describe it. It is sufficient if the declaration point out the gravamen of the complaint with certainty enough to enable the defendant to have notice of it, which I think has been done here, and that the naming of the place is to be referred to venue.

LE BLANC, J. It is said there are two parts of the declaration where local description was necessary in stating the cause of action, first in stating the navigation, their local possession of which the plaintiffs complain that the defendants have invaded; and this, it is said, is alleged to be situated at *Preston* by means of the relative word *there*. But if it be not necessary to allege the particular place where the injury was received, the Court will not read it as giving locality to the river *Irwell* at *Preston* in order to support a nonsuit for a false description: and I think it would have been sufficient to have said, that the plaintiffs were possessed of the navigation of a certain river called the *Irwell*, omitting the word *there* altogether. Secondly, it is urged that the local description was necessary to be given to the obstruction complained of, namely, the erection of the weir. But the gist of the action is that the defendants erected the weir *above* the plaintiff's navigation, by means of which their navigation was obstructed. It is quite immaterial *where* it was erected above the navigation. It would have been sufficient to have stated that they diverted the water above the navigation of the plaintiffs, by means of which the injury complained of happened. Neither is it necessary in actions of this kind to give a local description either to the property injured or to the thing which caused the injury: but it is sufficient to state what the property injured was, and that it was so injured by the defendants. In this case, therefore, it was not necessary to prove that the river *Irwell*, or any part of it, was within the town of *Preston*, or that the weir by which the obstruction was caused was within the same place: but the whole may be referred to matter of venue(1).

Rule absolute.

(a) *Grose*, J. being indisposed was absent.

(1) Vide *Jefferies v. Duncombe*, 11 East 227. S. C. at *Nisi Prius*, 2 Campb. 3.

Atkins and Others v. Banwell and Another.

2 East, 505. July 2, 1802.

The law will not raise an implied promise in the parish where a pauper is settled to reimburse the money laid out by another parish in which he happened to be in providing necessary medical assistance for him.

AN action of *indebitatus assumpsit* was brought by the plaintiffs, as the parish officers of *Toddington* in the county of *Bedford*, against the defendants as the parish officers of *Milton Bryant* in the said county, to recover 14*l.* 12*s.* for money paid, laid out, and expended by the plaintiffs, for meat, drink, board, lodging, medicines, medical assistance, and other necessaries found and provided by them for one *John Mitchell*, his wife and family: to which the general issue was pleaded. And at the trial before *Grose, J.* at the last *Bedford* assizes, a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case.

The plaintiffs are the parish officers of *Toddington*, and the defendants are the parish officers of *Milton Bryant*. *John Mitchell* was a pauper legally settled at the time of his illness and death, hereafter-mentioned, in *Milton Bryant*, but he resided with his wife and family at *Toddington*, and was there suddenly attacked with dangerous illness which prevented his being removed from the place of his residence to that of his settlement without endangering his life. The plaintiffs gave notice to the defendants of the illness of their pauper within two or three days after the pauper was so taken ill. The pauper's illness continuing, he afterwards, and about three weeks from such notice, died of such illness in the parish of *Toddington*; and the plaintiffs, as parish officers of that parish, from the time of such notice up to the pauper's death, laid out 14*l.* 12*s.* as well for necessaries for the pauper and his family, as for medicines and medical assistance for the pauper, and also on the funeral of the pauper after his death. The present action was brought to recover that sum. The jury found that there was no express promise of the defendants to pay it to the plaintiffs. The question for the opinion of the Court was, Whether such action be maintainable in law? If the Court should be of that opinion, then the verdict for the plaintiffs was to stand; if not, a nonsuit to be entered.

BEST, for the plaintiffs, said that there was a moral obligation at least in the defendants to repay the money expended for one of their own parishioners, whom by law they were compellable to maintain within their own parish; and therefore this case fell within the principle of *Watson v. Turner*, Sacc. Trin. 7 Geo. 3. Bull. N. P. 129. 147. 281, where an apothecary recovered against the parish officers for the cure of a pauper of the parish who was taken ill in another parish: there however there was a special promise to pay the plaintiff's bill after it was contracted.

LORD ELLENBOROUGH, C. J. That last circumstance makes all the difference. A moral obligation is a good consideration for an express promise; but it has never been carried further, so as to raise an implied promise in law. There is no precedent, principle, or colour for maintaining this action.

LE BLANC, J. There was a moral as well as legal obligation to maintain the pauper in his illness in the parish where he was at the time.

Per Curiam,

Wilson was to have argued for the defendants.

Let a nonsuit be entered(a)(1).

(a) Vide *Newby v. Willshire*, Cald. 527. and Stat. 35 Geo. 3. c. 101.

(1) Vide S. C. on a question of costs, 3 East 92. Actions like this have been sustained in *Connecticut. Spencer v. Overton*, 1 Day 188.

Waterhouse v. Sir Richard King, Bart.

2 East, 507. July 2, 1802.

An appointment by the Lords of the Admiralty of a captain in the navy to be *second* commander on board a king's ship is valid by their general authority to appoint what officers they think proper for the service, although another was appointed to the *first* command on board the same ship, and notice is only taken of one captain in the book of regulations for the navy. And such second captain is entitled to a captain's share of prize under the king's proclamation. The book of regulations for the navy, submitted by the lords commissioners of the Admiralty to the King in Council in 1780, and approved by his Majesty by an order of Council, is only directory to the lords commissioners.

THIS was an action for money had and received by the defendant to the use of the plaintiff; to which the defendant pleaded the general issue: and at the trial at the sittings after last *Hilary* term at *Westminster* before *Lawrence*, J. a verdict was taken for the plaintiff for 408*l.* 6*s.* 8*d.* subject to the opinion of the Court on the following case.

In the general regulations and instructions relating to his Majesty's service at sea, established by the annexed order(a) of the King in Council, are the following clauses, viz. under the title of "Rank and Command." Article 1. "The established number of flag officers of the navy shall be as follows, viz. one admiral and commander in chief of the fleet, one admiral of

(a) At the court, at *St. James's*, the 7th day of *January* 1780, present the KING's Most Excellent Majesty in Council.—Whereas the commissioners for executing the office of Lord High Admiral of *Great Britain, Ireland, &c.* did, on the 23d of last month, represent to his Majesty at this board, that the orders and instructions which have from time to time been issued for the better government of the Navy have been so imperfect, and through length of time become so perplexed, that the officers of his Majesty's Navy have been liable to fall into mistakes and omissions in the execution of their duty. And that for preventing any doubts or difficulties of this nature for the future, they have collected into a book the several rules and orders now in force in the navy and made such additions and alterations thereto as they thought necessary for that purpose; and have reduced the whole into distinct chapters and digested the same under proper heads, so that all the officers of his Majesty's ships may at one view be duly and sufficiently apprised of the duty of their respective posts. And the said lords commissioners did at the same time humbly present the said book to his Majesty for his royal approbation. And whereas the lords of the committee of Council (to whom his Majesty thought proper to refer the consideration of the said book) have this day reported to his Majesty that they have examined into the same, and do apprehend the said book of regulations and instructions may be proper for the service of the navy, and for the maintaining of and improving of good order and discipline thereof, and are therefore humbly of opinion that his Majesty may be pleased to approve of the said book, except in some particulars, which they have thought necessary to be altered, and except likewise all the articles contained therein which relate to the establishing three officers under the title of *Commodores*; as also to the restoring the establishment of pay and servants settled by his late Majesty King William in February 1693 on the commission officers of the fleet in lieu of the pay and servants allowed by the establishment now in force, which last establishment was approved by his said late Majesty King William in Council on the 18th of April 1700, which two points the lords of the committee did apprehend to be of so great consequence as to deserve a further deliberation, and have therefore humbly proposed to his Majesty that the consideration of them may be postponed, and that the establishment of pay and servants settled as aforesaid in the year 1700, and now in force, may for the present be observed. His Majesty was thereupon pleased, with the advice of his Privy Council, to approve the said book of regulations and instructions, together with the several alterations proposed by the lords of the committee to be made therein which alterations are accordingly made in the said book: And his Majesty doth hereby order that the further consideration of all the articles therein contained relating to the establishment of three *Commodores*, and also to the restoring the establishment of pay and servants as above mentioned, be postponed; and that the establishment of pay and servants, which received the approbation of his late Majesty King William in Council on the 18th day of April 1700, and is now in force, be for the present observed. And the said Lords Commissioners of the Admiralty are to give the necessary directions that the several regulations and instructions contained in the said book, which is hereunto annexed, be duly and punctually complied with.

"the white, and one admiral of the blue; one vice-admiral of the red, one of the white, and one of the blue: one rear-admiral of the red, one of the white, and one of the blue; and no brevet commission shall be allowed." And under the title, "An establishment of sea wages, and of the number of officers allowed to his Majesty's ships." (Article 9.) The wages of other officers and seamen, with the number of officers allowed to a ship of each rate, are as follows [after which there is a table with the figure 1 marked under each rate as the number of captains]. The number of flag officers of the navy has been considerably increased without any authority of the King in Council. Whenever any alteration is made in the number of officers allowed to a ship according to the statement of the table, it is usual to present a memorial from the lords of the admiralty to the King in council, and an order is made thereon.

On the 15th of *December 1786*, the following order in council was made, dated 15th *December 1786*: "Whereas there was at this day read at the Board a memorial from the lords commissioners of the admiralty dated the 14th of this instant, in the words following, (viz.) Lord *Sydney*, one of your majesty's principal secretaries of state having, in his letter of the 31st of *August* last, signified as your majesty's pleasure, that one of your ships of war should proceed with the transport vessels appointed to convey convicts to *Botany Bay*, on the coast of *New South Wales*, with a view to form a settlement at that place; and it appearing by the staff establishment of the intended settlement which accompanied his lordship's said letter, that it is your royal intention to appoint the captain of your majesty's ship employed upon this service to be governor or superintendant-general of the said settlement; we beg leave to represent to your majesty, that as it will probably be found expedient for the ship to proceed to some other parts of the coast, or to some of the islands in the Pacific Ocean, while the residence of the captain in quality of governor or superintendant may be requisite on shore, for the better forming and maintaining the settlement; we are of opinion it will be for the advantage of your majesty's service that an officer of superior rank to a lieutenant should upon such occasions, and at all times in the absence of the captain, have the charge and command of the said ship; and we do therefore humbly propose that your majesty will be pleased, by your order in council, to authorise us to appoint an additional officer to the said ship, under the denomination of second captain, with the rank of post-captain, and with power to command her in the absence of the principal captain; subject nevertheless to his control, and to such orders and directions as he may from time to time think fit to give for the regulation of his proceedings. That the pay of the second captain be equal to the pay of a 6th rate, and that he be allowed four servants. His majesty, taking the said memorial into consideration, was pleased, with the advice of his privy council, to approve of what is therein proposed, and to order, as it is hereby ordered, that the lords commissioners of the admiralty do appoint an additional officer to the man of war, that shall proceed with the transport vessels appointed to convey the convicts to *Botany Bay*, under the denomination of second captain, with the rank of post-captain," &c. (following the precise terms of the above-mentioned recommendation.)

The rank immediately superior to that of lieutenant is that of captain. Shortly after the making the above order in council, Captain *Phillips* of the navy was appointed governor of *Botany Bay* in *New South Wales*: and being about to depart for his government, he and Captain *Hunter* received from the lords commissioners of the admiralty their respective commissions of commander and second commander of his majesty's ship the *Sirius*, a sixth rate ship with 160 men, similar to the two commissions, dated the 17th *July 1794*, hereinafter set forth. On that occasion Captain *Phillips* was allowed seven servants, and Captain *Hunter* four. In the year 1794, Captain *Hunter* was

appointed to succeed Captain *Phillips* in the government of *Botany Bay*, and on his departure the following commissions issued to him and the plaintiff, (*viz.*)

"By the commissioners for executing the office of lord high admiral of
 "Great Britain and Ireland, &c. and of all his majesty's plantations, &c.
 "To *John Hunter*, esq. hereby appointed commander of his majesty's armed
 "vessel the *Reliance*. By virtue of the power and authority to us given, we
 "do hereby constitute and appoint you commander of his majesty's armed
 "vessel the *Reliance*, willing and requesting you forthwith to go on board and
 "take upon you the charge and command of commanding in her accordingly;
 "strictly charging and commanding all the officers and company of the said
 "armed vessel to behave themselves jointly and severally in their respective
 "employments with all due respect and obedience unto you their said com-
 "mander: and you likewise to observe and execute the general printed in-
 "structions, and such orders and directions as you shall from time to time re-
 "ceive from us, or any other your superior officers for his majesty's service;
 "hereof nor you nor any of you may fail, as you will answer the contrary at
 "your peril; and for so doing this shall be your warrant. Given under our
 "hands and the seal of the office of admiralty, this 17th of July 1794, in
 "the 34th year of his majesty's reign.

(Signed) "A. GARDNER.
 "P. AFFLECK.
 "CHAS. MIDDLETON.

"By command of their lordships,

"PHILLIP STEPHENS."

"By the commissioners for executing the office of lord high admiral, &c.—
 "To *Henry Waterhouse*, esq. hereby appointed second commander of his
 "majesty's armed vessel the *Reliance*, with the rank of commander, and with
 "power to command her in the absence of the principal commander; subject
 "nevertheless to the control, and to such orders and directions as he may from
 "time to time receive from the said principal commander for the regulation of
 "his proceedings. By virtue of the power and authority to us given, we do
 "hereby constitute and appoint you second commander of his majesty's armed
 "vessel the *Reliance*; willing and requiring you forthwith to go on board and
 "take upon you the charge and command of second commander in her ac-
 "cordingly; strictly charging and commanding all the officers and company
 "of the said armed vessel the *Reliance* to behave themselves jointly and
 "severally in their respective employments with all due respect and obedience
 "unto you their second commander, and you likewise to observe and execute
 "the general printed instructions and such orders and directions as you shall
 "from time to time receive from us, or any other your superior officers for
 "his majesty's service; hereof nor you nor any of you may fail, as you will
 "answer the contrary at your peril; and for so doing this shall be your war-
 "rant. Given under our hands, and the seal of the office of admiralty, the
 "17th of July 1794," &c.

(Signed as the last.)

No memorial was presented from the Lords of the Admiralty on occasion of the above commissions; nor was any order of the King in Council made relative thereto. The said *John Hunter* was allowed four servants, and the plaintiff two. The Lords of the Admiralty have since once on a similar occasion, where a captain in the navy has been appointed governor of *Botany Bay*, issued to such governor and to another and to a junior captain concurrent commissions of the like tenor with those above set forth. Some-time in the year 1795, previous to the breaking out of the *Dutch* war, the *Reliance*, a sloop with 84 men, whilst on the *Botany Bay* service, with the said *John Hunter* and the plaintiff actually on board, and others his Majesty's ships of war, by orders from the Lords of the Admiralty detained

several *Dutch* vessels. These ships were afterwards sold, and the produce thereof is now in the hands of the defendant to be distributed as a donation according to the King's proclamation of the 25th November 1795 for distribution of prizes taken from the subjects of the *United Provinces* during the late hostilities, which directs as follows: "That the neat produce of all prizes which were or should be taken by any of his Majesty's ships or vessels of war should be for the entire benefit and encouragement of his Majesty's flag officers, captains, commanders, and other commissioned officers in his Majesty's pay, and of the seamen, &c. on board his Majesty's said ships and vessels at the time of the capture, and that such prizes might be lawfully sold and disposed of by them and their agents after the same should have been to his Majesty adjudged lawful prize, and not otherwise. The distributions should be made as follows; the whole of the neat produce being first divided into eight equal parts. The captain or captains of any of his Majesty's said ships or vessels of war who should be actually on board at the taking of any prize should have three eighth parts: but in case any such prize should be taken by any of his Majesty's ships or vessels of war under the command of a flag or flags, the flag officer or officers being actually on board, or directing and assisting in the capture, should have one of the said three eighth parts, the said one eighth part to be paid to such flag officer or officers in such proportions and subject to such regulations as are therein after mentioned, viz. The captains of marines and land forces, sea lieutenants, and master on board should have one eighth part to be equally divided amongst them, (physicians appointed, &c. and actually on board at the time of a prize taken, &c. to share with the sea lieutenants, &c.) The lieutenants and quarter-masters of land forces, secretaries of admirals or of commodores with captains under them, boatswains, gunners, purser, carpenter, masters' mates, chirurgeon, pilot and chaplain on board should have one eighth part to be equally divided between them." [Then follows the remaining proportions distributed among other inferior classes of persons by name on board the King's ships, ending with seamen and marines, and "all other persons doing duty and assisting on board."] "Provided that if any officer being on board any of his Majesty's ships of war at the time of taking any prize should have more commissions or offices than one, such officer should be entitled only to the share or shares of the prizes which according to the above mentioned distribution should belong to his superior commission or office." [Then follows an injunction to all commanders of his Majesty's ships, &c. taking any prize, to transmit to the commissioners of the navy, a true list of the names of all the officers, seamen, &c. and others who were actually on board at the time; which list should contain the quality of the service of each person on board, and be subscribed by the captain or commanding officer, &c. and also a direction to the said commissioners to grant a certificate of such lists transmitted to them to the prize agents appointed by the captors, and also such lists from the muster books of any such ships of war, &c. as the said agents should find requisite for their direction in paying the produce of such prizes, &c.]

The sum given by the verdict is a captain's share of the proceeds of the said ships. During all such time as the plaintiff was so commissioned to the *Reliance* he was mustered, borne on the ship's books, received his pay, and during the absence of the said *John Hunter*, as well before as after the detention of the said *Dutch* ships, was corresponded with and had letters of service addressed to him from the Lords Commissioners of the Admiralty, those of the navy and victualling and from the flag officers under whose command the ship was, as captain of that ship; and as such, during Captain *Hunter's* absence, attested seamen's letters of attorney and wills, which were allowed and passed by the proper officer at the office of the commissioners of the navy. But whenever Captain *Hunter* and the plaintiff were on board, they performed

their respective duties agreeable to their several commissions. A prize list of the officers, seamen and others who were actually on board the *Reliance* at the time of the said capture was duly made out and signed by the plaintiff, and transmitted by him to and approved by the Navy Board, and by that board handed over to the defendant, in which list the plaintiff was set down as second commander of the said ship. The question for the opinion of the Court is whether the plaintiff be entitled to recover?

Burton for the plaintiff contended, 1. That the power of the Lords Commissioners of the Admiralty was not restrained to the appointment of one captain only on board each ship. The book of regulations made under the order of Council of 1730 was not intended to control the general powers delegated to them by the King's commission for exercising the office of High Admiral, which is conceived in the most extensive terms(a), and without which powers the well-being of that most important service could not be secured. These regulations were drawn up by the Lords Commissioners themselves for his Majesty's approbation, in order to give them greater weight in the service: but it is not to be inferred from thence that they could not have promulgated the same by their general authority; for the whole is done in the name of the Admiralty. The order of Council does not purport to be an *order to* the Admiralty to adopt the regulations in question, which it would have done had it been so intended. The Admiralty have always and still continue to exercise the more important functions of commissioning the several ships and appointing the different officers to their respective commands, to which the power of regulation is merely collateral; and having before varied the rules existing before 1730, they have the same authority to vary them again; and they have in fact increased the number of flag officers since that period. But if there were any doubt on that point, at any rate the plaintiff's appointment was authorized by the second order of Council of the 15th December 1786: and the very reason of the thing shews that it was intended as a general regulation in the new established colony, and not merely confined to the first appointment of Captain *Hunter* as second captain under Captain *Phillips*. If then the plaintiff were properly appointed to the station which he held of second captain or commander on board the ship, 2dly, he is entitled to a captain's share of the prize money under the King's proclamation. There is no other class to which he can belong. He had all the attributes of a captain in the absence of the first captain: letters of service were directed to him by the several public boards as such; and he was mustered and ranked as such, and acted in all other respects in that capacity. If he had been guilty of any offence, he could only have been tried by a court-martial in the character of captain. The prize act 33 Geo. 3, c. 66, vests the prize in the flag officers, commanders and other officers and seamen, &c. in such shares as the King by his proclamation shall appoint; there is nothing in the latter to confine the number of officers, captains or others, on board each ship; but the words apply to every person bearing the commission of captain, let the number be what it may. It

(a) The admiralty commission (which was not stated in the case, though agreed to be referred to) is in very general terms; being "to execute and perform all things which belong or appertain to the office of high Admiral of Great Britain, &c. as well in touching all those things which concern our navy and shipping, as those which concern the right and jurisdictions of and appertaining to the office of High Admiral; and to make orders and issue warrants for the repairing and preserving our ships, &c. already built and to be built; and for fitting and furnishing, arming, victualling, and setting forth such ships and fleets as you shall receive directions for; and also to direct entertainments, wages, and rewards for such persons as shall be employed in those services or any thing appertaining thereto. And afterwards reciting that all offices, places, and employments belonging to the navy and admiralty are properly in the trust and disposal of the Lord High Admiral, it declares and grants that all such offices, places, and employments as shall fall void shall be given and disposed of by the commissioners, or any three of them."

could not be the intention of the King to restrain the division of the prize to those only who were ordinarily appointed in the several stations on board of ship, although other officers were appointed by competent authority, who had shared the dangers and difficulties of the enterprize with them. The plaintiff's appointment as *second* commander *eo nomine* does not exclude him from sharing under the general term of *captain* in the proclamation. It would have been implied though not so expressed, and was only used in contradistinction to the *first* commander or captain, who it cannot be denied would be entitled to share; and in whose absence the plaintiff acted in all respects as *captain* or *commander* without any other relative appellation.

Gaselee, contra, denied 1st, that the Lords Commissioners had authority to appoint a *second* captain on board a ship; the regulations made under the order of Council of 1730 restraining them to appoint more than one captain or commander to each ship. It is true, the Admiralty commission gives them general powers which in terms might warrant this appointment; but that must be governed by usage, and it is not inconsistent with a controlling power lodged in the Crown of giving the Lords Commissioners certain rules for the government of their general discretion. Then the order of Council of 1730 shews that the Admiralty act in subordination to the King in Council: for thereby certain regulations which were proposed by the Lords Commissioners for the approbation of the King are sanctioned by him; in which it appears that only *one* captain is allowed to each ship, though the number of lieutenants varies according to the rate of it; and from thence it also appears, that the plaintiff was not allowed so many servants in proportion to the number of men as by the regulations he was entitled to; namely, only two instead of four: which shews that his appointment was not under the first order of council. Neither was it warranted by the second order of council; for that was made upon a special occasion, and was afterwards *functus officio*. Besides, there too the second captain was directed to be allowed four servants, and here the plaintiff had only two. [*Lawrence*, J. The second order does seem to be confined to the particular instance.] 2dly, Even if the appointment were valid under the general authority of the Admiralty, the plaintiff had no right to share prize. For in this instance it could not be claimed under the prize acts, but purely from the King's bounty: the seizure having been made before any letters of reprisals had issued. The distribution of prize under the King's proclamation is calculated according to the number and rank of the persons who are to share in it; 1-8th to the flag-officers, 3-8ths to the captains, &c. The flag officers, however, if several, do not share in equal proportions, but according to their rank: but the captains all share alike, considering them equal in rank to each other, and consequently allowing but one to each ship: if therefore one who is only second in rank on board one ship is to share in common with his own and all the other captains, that alters the proportion of the whole, and gives to that ship a larger share than the rest: by these means the smallest ship in a squadron might take the greatest share. It is not necessary to consider what the effect would have been if Captain *Hunter* had been on shore and the plaintiff commanding on board at the time of the capture; but at any rate, he was only appointed commander *in the absence* of the proper captain. And according to *Lumley v. Sutton*, 8 Term Rep. 224, though the plaintiff in fact acted as captain on board, yet the proper and lawful captain and commander may still be entitled to the captain's share. The plaintiff having been liable to be tried by a court martial as a captain for any breach of duty cannot vary the question of prize: Captain *Lumley* was so liable, and he also acted and was addressed as captain by letter, and paid as such, and yet he was holden not entitled to share prize as captain.

Burton, in reply, observed as to the number of servants allowed to the plaintiff being fewer than was directed by the order of 1786, the number allowed depended upon the proportion of men to the ship, which was fewer in

this instance than in the other, and the relative proportion was the same. That it was sufficient to entitle the plaintiff to prize if he were *de facto* appointed to act as captain of the ship in his own right, and not as in *Lumley v. Sutton*, in the place of the lawful commander.

LAWRENCE, J. (a) Two questions have been made; 1st, whether the plaintiff were appointed by any competent authority to be second captain of his Majesty's armed vessel the *Reliance*; and 2dly, if so appointed, whether he be entitled to a captain's share of the prizes in question. As to the first, the Lord High Admiral had a general and extensive authority to commission what ships and appoint what officers he pleased to act on board them. The same authority is now delegated to the Lords Commissioners in very general terms, who are empowered "to execute and perform all things which belong or appertain to the office of High Admiral." No doubt the commissioners are liable to receive particular orders from the Crown touching all matters which fall within their cognizance; but these are only directory; and if they issue any commission contrary to such orders, they may be guilty of misconduct in their office, but that does not avoid the commission itself. It was competent, therefore, for the Lords of the Admiralty to appoint as many captains as they pleased on board this ship. Then it is said, that the plaintiff was only appointed second commander *during the absence* of the first from the ship; but that is not so; for he was appointed second commander *generally*, and was to assume the command of the ship in the absence of the first commander, whom he was to obey when present. But his appointment of second commander was general without reference to the absence of Captain *Hunter*: and the commission requires the plaintiff generally to take on himself the charge and command of second commander; and all the officers and company of the vessel are enjoined to pay due respect and obedience to him as such: the admiralty evidently considering that the duty of a second commander was before known to the person to whom the commission was directed, and to those who were required to obey him as such. He was no supernumerary or occasional officer, as contended for; his pay accrued, and he was entitled to his allotted number of servants as well when Captain *Hunter* was on board as when he was absent. This, therefore, is not like the case of *Lumley v. Sutton* to which it was compared; for there the plaintiff was clearly a supernumerary; he was neither rated, paid, nor returned as captain of the ship, nor had any allowance of servants. Then taking the present plaintiff to be only an officer *de facto* appointed to the rank of second commander of the ship, and acting as such, to be sure the words of the proclamation are sufficiently large to comprehend him in the distribution of prize; and I do not see that the word *captains* must mean the captains of different vessels: it includes all of that rank, though there be more than one appointed to some particular vessel.

LE BLANC, J. The plaintiff is entitled to all the advantages of the rank which he held on board this vessel, unless his appointment were made without any authority whatever. But though it be not stated, as it ought to have been, in the case, what the commission of the Lords of the Admiralty is, yet we may take it to be the same in this respect as that of the Lord High Admiral formerly; and we know that he had a general authority to appoint what officers he pleased on board the ships. Then the plaintiff was by his commission directed to go on board this vessel as second in command with the rank of commander, and with power to command the vessel in the absence of the principal commander. This was not an appointment of him as a supernumerary like the case of Captain *Lumley*, but generally to act as second commander, and the ship's company were required generally to obey him as

(a) Lord *Ellenborough*, C. J. gave no opinion, having been concerned as counsel in the cause; and *Grooe*, J. was absent from indisposition.

such, and in the absence of the first captain he was to have the principal command. His appointment, therefore, was permanent; and in effect it was only saying, that during the time the first captain was on board, the plaintiff was to act in subordination to him as second in command. Then taking him to be well appointed by those who had a competent authority, and to have been second captain whether the principal one were present or absent, I see no reason for saying that he is not entitled to share as captain in the prize within the words of the proclamation, which are general, comprehending all officers *commanding* on board ships at the time of the capture.

LAWRENCE, J. further observed, that upon a review of the plaintiff's commission, it appeared that the object of it was not so much to limit his ordinary authority in the ship during the time Captain *Hunter* was on board, but rather to increase the ordinary power of the latter, by giving him authority, though resident on shore, to issue his command to the captain commanding on board.

Postea to the Plaintiff.

Man v. Shiffner and Ellis.

2 East, 523. July 2, 1802.

The assignee of a policy of insurance on goods, who became such by the indorsement to him of the bill of lading of the goods by the consignor after he had directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; and can only claim, subject to that lien, the money received on such policy by the broker, in whose hands it was deposited for that purpose by the correspondent. But the broker has no sub-lien on the policy for the general balance of his own account with such correspondent, if he knew at the time that the policy was effected for another person.

THIS was an action for money had and received by the defendants for the plaintiff's use. Plea, *non assumpsit*. The cause was tried at the Sittings after *Michaelmas* term 1801, before Lord *Kenyon*, C. J., when a verdict was found for the plaintiff for 500*l.* subject to the following case.

R. *Heath*, a planter in *Jamaica*, for a valuable consideration in money paid to him by one *Allen*, as agent to the plaintiff and *L. Parkinson*, drew bills of exchange on Messrs. *Atherton* and *Astley* of *Liverpool*, the merchants of *Heath*, in favour of the plaintiff and *Parkinson*, which *Atherton* and *Astley* refused to accept (not having funds in their hands of the drawer *Heath*), and the same were returned. The share of *Parkinson* in these bills was afterwards paid: and on the 18th *July* 1800, *Heath* shipped in *Jamaica* on board the *Hero* Captain *Lightfoot* for *Liverpool* 25 tierces of sugar, to be delivered to the order of the shipper, for which Captain *Lightfoot* signed a bill of lading, and upon which bill of lading, delivered by *Heath* to *Allen*, the following indorsements were made. (1st indorsement.) "Captain *Lightfoot*. Sir, If Messrs. *Atherton* and *Astley* will engage to pay the net proceeds of the within-mentioned 25 tierces of sugar to the order of *W. Allen*, you will in that case deliver them to the said Messrs. *Atherton* and *Astley*; but if they do not so engage, &c. you are then to deliver the same to the order of the said *William Allen*, who is entitled and hereby authorised to recover and receive the amount insured on the same in case of loss, having received value for the same this 19th day of *July* 1800. *Richard Heath*." (2d indorsement.) "To Captain *Lightfoot*. Sir, If Messrs. *Atherton* and *Astley* engage to pay the net proceeds of the within-mentioned 25 tierces of sugar to *L. Parkinson* or his order, you will in that case deliver the said sugar to the said Messrs. *Atherton* and *Astley*, otherwise you are to deliver them to the order of the said *L. Parkinson*; value received of him in *Jamaica*. (Dated) 23d *July* 1800, (and signed) *William Allen*." (3d indorsement.) "I hereby as-

sign, transfer, and set over to *James Man* pursuant to the directions of *W. Allen* all the right, title, property, and interest vested in me to the within bill of lading and to the contents, by virtue of the above indorsement from the said *W. Allen* to me. (Dated) 18th March 1801, (and signed) *L. Parkinson*." *Allen* transmitted the bill of lading with the two first indorsements thereon to *Parkinson* for the use of himself and the plaintiff; and when *Parkinson* had received the money due to him from *Heath*, he made the 3d indorsement on the bill of lading, and delivered it to the plaintiff. Before the sugars were shipped, viz. on the 17th of June 1800, *Heath* wrote a letter to Messrs. *Atherton* and *Astley*, in which after noticing his engaging so many tierces by the ships *Hero* and *Bacchus*, their delay in sailing, and the uncertainty of the crops, &c. he directs them to "insure by ship or ships at and from *Montego Bay* as interest may appear." In consequence of this letter Messrs. *Atherton* and *Astley* wrote to the defendants as follows: "Messrs. *Shiffner* and *Ellis*, *Liverpool*, 2d September 1800. Please to insure 1000*l.* on sugars as "interest may appear, valued at 20*l.* per hogshead, on ship or ships at and "from *Jamaica* to *Liverpool*, on account *R. Heath*. The *Hero* and the *Bacchus* are mentioned as likely to have most of the property on board." In pursuance of this letter the defendants as agents caused the insurance to be made in the same terms as directed, which policy has ever since remained in their possession. The ship *Hero* sailed from *Jamaica* in January 1801, and was lost on the 12th February 1801. After the loss the plaintiff being then possessed of the bill of lading tendered to the defendants the premium paid on effecting the policy, and demanded the policy of them, which they refused to deliver. And after he had discovered that the underwriters had paid the loss to the defendants, he demanded of them the money which they had so received, but which they refused to pay. At the time the insurance was ordered, and also when it was effected, *Heath* was the debtor of *Atherton* and *Astley* as his merchants and factors to a larger amount than the sum insured; and the defendants, as the insurance brokers of *Atherton* and *Astley*, were their creditors to more than the sum recovered upon the said policy; which debts remained unsatisfied: and the reason assigned by the defendants for retaining the policy and the sum recovered thereon when the same were demanded by the plaintiff was, that *Atherton* and *Astley* were creditors of *Heath*, and debtors to the defendants; and the defendants insisted that they had a lien upon the policy and the money recovered thereon for the balance due to them by *Atherton* and *Astley*, which balance exceeded the sum recovered from the underwriters. On the 1st January 1801, *Atherton* and *Astley* stopped payment. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover in this action? If the Court were of opinion that the plaintiff was entitled to recover, the verdict to stand, and the damages to be settled by arbitration: but if the Court should be of a different opinion, then a verdict to be entered for the defendants.

Rose, for the plaintiff, contended that *Atherton* and *Astley* had no lien on the policy against the plaintiff; or if they had, they could not transfer it to the defendants. 1. Though *Atherton* and *Astley* as factors might have had a lien on the policy for their general balance against their correspondent according to *Godin v. The London Assurance Company*, 1 Burr. 493-4, yet that could only be while they had the policy in their possession, which they never had in this case. The general principle is not denied in *Drinkwater v. Goodwin*, Cowp. 251, and was fully recognized in *Kinlock v. Craig*, 3 Term Rep. 119. 783-7, and *Hammonds v. Barclay*(a). 2dly, Supposing *Atherton* and *Astley* ever had a possession of and lien on this policy, they could not transfer it to the defendants. For though a factor may sell yet he cannot pledge the goods of his principal as a security for his own debt. *Paterson v. Tash*, 2 Sra. 1178,

and *Daubigny v. Duval*(a). But here the defendants claim to retain not as agents of *Atherton* and *Astley*, but for their own debt due from *Atherton* and *Astley*. There is however no contract either express or implied between these parties, which can enable the defendants to charge the proceeds of the policy in their hands with their demand against third persons. The most, according to *Green v. Farmer*, 4 Burr. 2214, they could claim to deduct would be the premium paid to the underwriters upon the particular policy, which was tendered to them. Neither could the defendants by any act of theirs now give a lien to *Atherton* and *Astley*. For in *Sweet v. Pym*(b) it was holden, that one who once had a lien on goods in his possession, if he afterwards parted with the possession, could not stop them in their transit to the principal, nor revest his lien by procuring a bill of lading to be signed to his order by the carrier. The only ground on which the defendants could have retained for their claim upon *Atherton* and *Astley* was if they had effected the insurance for them without knowledge of the principal; but as that is negatived by the facts found, it brings it precisely within the case of *Maanss v. Henderson*, 1b. 335, which negatives the broker's lien against the principal in such a case for the debt of the factor, by whom the order for insurance was given.

Park, contra, admitting the general principles laid down in the cases cited, distinguished this from *Maanss v. Henderson*, because there *Jennins* the factor or middleman claimed no lien on the policy as against the principal: and here the lien is claimed not merely for the defendant's demand against *Atherton* and *Astley per se*, but for *Atherton* and *Astley's* demand against *Heath* the original consignor. And here the possession of the defendants is to all intents and purposes the possession of *Atherton* and *Astley*, whose servants they were, and under whose immediate orders they acted in effecting the insurance. A man may have a virtual possession through the agency of another. If the goods had arrived at *Liverpool*, and the warehouses of *Atherton* and *Astley* being too full to receive them, they had employed the defendants as their brokers to keep the goods for them, the legal possession would still have remained in the factors, as between them and their principal; though the brokers might have acquired a sub-lien for the amount of the warehouse rent. Many cases of lien have been established by the party's putting his mark on the goods while in the actual possession of a third person, as in *Ellis v. Hunt*, 5 Term Rep. 464. In that view even the case cited of *Daubigny v. Duval*, 5 Term Rep. 606, is in favour of the defendants; for there the possession of the pawnee was holden so much the same as that of the factor, that the principal could only recover the goods from such pawnee by proving a tender to the factor of what was due to him. Then if the factors had a lien on the policy in the hands of their brokers for the amount of their general balance as against the original consignor, the latter could not vary that lien by afterwards consigning the goods to the plaintiff; and the money received by the defendants upon such policy must be subject to the same lien as the policy itself. It is money had and received to the use of the persons conscientiously entitled to it. And this being an equitable action, the plaintiff can only recover according to conscience and good faith(c). The law creates the lien of the factors, and if the plaintiff as consignee of the goods will avail himself of their act in effecting the policy, he must do it

(a) 5 Term Rep. 606. But Lord *Kenyon*, C. J. there thought that the principal was bound to tender to the pawnee the sum due from himself to the factor. The other judges thought it sufficient if such tender were made to the factor.

(b) Ante, 1 vol. 4.

(c) This argument was addressed to a doubt thrown out at first by the Court as to whether the defendants could set up any claim by *Atherton* and *Astley* against the original consignor to whose use the money had not been received by them, as before the payment by the underwriters the plaintiff had become entitled to the goods insured.

subject to their claims in respect of such act done. The validity of the factor's lien on the policy, notwithstanding a subsequent alteration in the consignment of the goods, is in terms admitted by Lord Mansfield in delivering the judgment of the Court in *Godin v. The London Assurance Company*, 1 Burr. 493, where he puts the very case in question.

Rose, in reply, observed that *Atherton* and *Astley* never could be said to have had even an equitable claim on the policy; for the consignment of the goods was only made to them *conditionally*, in case they undertook to pay over the net proceeds, which they had not done. That at most they could only have the same lien on the policy as they would have had on the goods insured if they had arrived; and therefore, as the property in the net proceeds was anticipated, nothing could be retained but the amount of the premium paid for effecting it.

Curia adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court(a) in favour of the defendants. Their opinion, he observed, was not founded on any right which the defendant had to retain the policy from the plaintiff on the ground of having a lien on it to satisfy their claim on *Atherton* and *Astley*; but considering them as the servants of *Atherton* and *Astley*, who were entitled to hold the policy as against the plaintiff who claimed from *Heath* the consignor until their claim on *Heath* was satisfied on the score of their general balance. The case, he added, had been obscured by bringing forward the defendants' lien instead of that of *Atherton* and *Astley*, in whose hands the policy was to be considered as in effect remaining. Then as the plaintiff could only have recovered the policy out of the hands of *Atherton* and *Astley*, by satisfying their lien, so the same lien attached on the proceeds of that policy recovered from the underwriters; and as that lien exceeded the plaintiff's demand, the defendants as servants of *Atherton* and *Astley* were entitled to retain the whole in this action.

Postea to the Defendants(b).

Kenebel v. Scrafton and Others.

2 East, 530. July 3, 1802.

A. by will provided an annuity for B., with whom he cohabited, and directed his trustee and executor out of his real estate in case he should have any child or children by B., to raise 8000*l.* to be paid to and amongst his said children, and devised the remainder of his estate over to several of his relatives: afterwards he married B. and had several children by her: held that such subsequent marriage and births did not revoke his will, the objects having been therein contemplated and provided for. Qu. Whether such implied revocations may be rebutted by evidence of parol declarations of the testator made after the events that he meant his will to stand?

THIS was an issue directed by the Court of Chancery to try whether the real estates of *James Bradshaw Pierson* were well devised by his will dated 28th Jan. 1795. On the trial before Lord Kenyon, J. at the Sittings after last Trinity term, a verdict was found for the plaintiff, subject to the opinion of this Court on the above question.

J. B. Pierson by will duly executed and attested, dated 28th January 1795, after directing payment of his debts, devised as follows: "As to all my freehold, copyhold, real and personal estates of which I am possessed or entitled to at the time of my decease, my copyhold estate in the manor of *Kennington* having been by me surrendered, or intended so to be, to the use of this my will, I give, devise and bequeath the same to M. Scrafton, to

(a) *Grose*, J. was absent, being indisposed.

(b) *Vide Delany v. Stoddart*, 1 Term Rep. 26, and *Hibbert v. Carter*, *ib.* 747.

have and to hold the same real and personal estates, &c. to the said *M. S.* his heirs &c. upon the several uses, trusts, &c. hereinafter mentioned, (*viz.*) I give all my personal estate whatsoever, and wheresoever, &c. to my dearly beloved *Mary Ann Simpson*, one of the daughters of *J. Simpson*, &c. for her sole use and benefit for ever; and I will that out of the rents, &c. of my said freehold and copyhold estates or by mortgage, &c. my said trustee *M. S.* shall pay unto the said *M. A. Simpson* an annuity of 150*l.* for her life. *And in case I shall have any child or children by her* who shall be living at my decease, then I order that my said trustee out of the rents and profits of my said freehold and copyhold estates, or by mortgage, &c. to pay for the maintenance and education of each such child 60*l.* until their respective age or ages of 21 years; and on that event happening, I order my said trustee to levy and raise 3000*l.*, and pay the same unto and amongst my said children by *M. A. Simpson*, share and share alike; and if but one such child, the whole of the said 3000*l.* to be paid to such surviving or only child, his executors, &c. And as to all and singular my said freehold and copyhold estates, &c. (subject to the annuities and payments aforesaid, and also subject to the legacy of 100*l.* hereinafter mentioned) I give, devise and bequeath the same to the use of my father *J. B. Pierson*, my half brother by blood *V. Pierson*, my half brother by blood *A. Pierson*, and my half sister by blood *W. Pierson*, their several and respective heirs, &c. in equal shares, to have and to hold the same to them and their heirs, &c. for ever as tenants in common and not as joint tenants. I give and bequeath to my said trustee and executor *M. S.* the said 100*l.*, &c. (Then follows a power to him to retain for his charges in executing the trusts, &c. of the will.) And as to all the rest and residue of my real and personal estates not before specifically devised, I give devise and bequeath the same to the said *M. S.* his heirs, &c. upon the several trusts, &c. and for the several uses, &c. and charged as before mentioned; and then he constituted the said *M. S.* sole executor, &c.

The testator, on the 29th of *August* 1795, intermarried with the said *Mary Ann Simpson* in the will mentioned (now *Jennings*, one of the defendants). After their marriage he had three children by her, *viz.* the defendants *M. Pierson*, *W. Pierson*, and *A. M. Pierson*, who was born six months after the testator's death, and since deceased. At the time of making his will, the testator had one male child living by *M. A. Simpson*, who died on the 9th of *June* 1795, before the marriage. On the 19th of *July* 1798, the testator died without altering or expressly revoking his will, leaving the defendant *M. A. Pierson* his widow, now *Jennings*, and the defendants *M. Pierson* and *W. Pierson*, his two children him surviving; and which children, together with their deceased sister, *A. M. Pierson*, upon her birth became and were co-heiresses at law, and also the customary heir of the said testator as to the copyhold estate of the said testator in the said manor of *Kennington*, in the will mentioned, and which was duly surrendered to the uses of the will. About five months before the testator's death, in a conversation with his wife in the presence and hearing of *Joseph Simpson* her father, upon her requesting him to alter her maiden name as it then stood in his will to her then married name of *Pierson*, the testator said *it was not of any consequence; for that he had consulted a professional gentleman, who told him that the will as it then stood was a good and sufficient will: and observed he had thereby amply provided for her and her children.* And a short time before his death, in another conversation in the presence and hearing of *Edward Young*, relative to the testator's late solicitor's bill of costs, wherein was charged five guineas for making his will, he the testator observed *that he thought it a very exorbitant charge; for that he himself copied the will.* The will and duplicate thereof are in the testator's own hand-writing. The testator at the time of his death was indebted to divers persons as well by simple contract as otherwise to a very

considerable amount, and which debts are yet due and unpaid. The testator died seized of no freehold estate, but was at the time of making his said will, and also at his decease, seized as of fee at the will of the lord, according to the custom of the manor of *Kennington*, of the copyhold estate in the will mentioned, holden of the manor of a considerable annual value. The testator's personal property being small and very insufficient for the payment of his debts, which were of great amount, the plaintiff, a creditor, filed his bill in the Court of Chancery on behalf of himself and the other creditors of the testator against *M. S.* the executor and the other parties claiming interest in the real and copyhold estates devised by the will under the disposition thereby for the usual accounts and administration of the personal assets towards discharge of the testator's debts, and to have the deficiency raised by sale or mortgage of the real and copyhold estates under the charge made by the will for that purpose. The case was argued in *Easter* term last.

Barrow for the plaintiff. The will had all the proper requisites of such an instrument to pass real estate, and none of those things happened after the execution of it, which the statute of frauds, 29 Car. 2. c. 3. s. 6, points out as the only means by which such a will shall be revoked. Admitting however, that by the authorities marriage and the birth of a child amount to an implied revocation; still that can only be where there is nothing to rebut that implication, as there is in this case. In *Doe v. Lancashire*, 5 Term Rep. 49. 58, Lord *Kenyon* assigned as a reason why marriage and the subsequent birth of a child amounts to a revocation, because it is a *tacit condition annexed to the will itself at the time of making it*, that the party does not then intend that it should take effect if there should be a total change in the situation of his family. Under such circumstances it is more reasonable to presume that he never meant the will to take effect at all than that his wife and children should be wholly unprovided for: but that reason cannot apply where the testator foresaw the existence of these relations and provided for them accordingly. Here are, besides, other circumstances which very much outweigh the presumption of an implied intention in the testator to revoke; and this intention being implied from matter of fact collateral to the instrument itself, may well be rebutted by other facts denoting a contrary intention. As in *Brady v. Cubitt*(a), Lord *Mansfield* said "that he was clear that this presumption, like all others, "might be rebutted by every sort of evidence." He then adverted to the two conversations of the testator subsequent to his marriage and the birth of children, in which he recognized his will: and relied on another circumstance, namely, the provision for payment of debts by charging the real estate, which would be defeated by setting aside the will, the personalty not being sufficient for that purpose. The question will be, whether natural love and affection for a wife and children, or the justice due to creditors, be the more weighty and worthy consideration. This circumstance has not occurred to be considered in the prior cases of implied revocations of this sort; and though natural love and affection be a sufficient consideration in law, yet at least it is voluntary, and not to be preferred to creditors who are purchasers for a valuable consideration. And here there is less reason for presuming an intention in the testator either co-existent with or subsequent to the time of making his will, that the just provision for his creditors should be annulled by the subsequent marriage and birth of children whom he had by the same instrument provided for.

(a) Dougl. 31. 39. In Mr. Justice *Buller's* note of his own opinion in this case, which I have in MS. he says, "That parol evidence was always admissible to rebut, though never to raise an equity. And so it was holden by this Court in the case mentioned of *Goodright* "d. *Hodges v. Clangfield*(1), and *Lake v. Lake*. That if the subsequent written papers, "and the parol evidence in this case were received, which he thought they must be, it was "perfectly clear and so admitted, that there was no intention in the testator to revoke his will, "and consequently on the whole no ground for the Court to imply it."

(1) Q. This is the case called *Rogers v. Langfield*, in the printed report.

R. Smith, contra. It is admitted that a subsequent marriage and the birth of a child amount in law to a revocation of a prior will, whether such revocation be founded on a presumed alteration of intention in the testator, or on a tacit condition annexed to the will at the time of making it, as was said in *Doe v. Lancashire*, 5 Term Rep. 68. Two questions then arise, 1, Whether any circumstances exist in this case to rebut the presumption of an intention to revoke? 2, Whether such extrinsic circumstances as are mentioned can be received in evidence at all? 1, The provision in the will for the same person who was afterwards his wife, and the children whom he might afterwards accidentally have by her, cannot do away the effect of the tacit condition of revocation annexed by law to his subsequent marriage, and the birth of a legitimate child; because at the time of making the will he did not contemplate the objects in the legal relation in which they afterwards stood to him. *Voet Pandect.* lib. 28. tit. 2. s. 2. Suppose one by will made immediate provision for several, at that time most nearly connected with him, and by a remote limitation also provided for a feme and such children as she might have, and he afterwards married her; the possibility of such provision would not satisfy the presumption or tacit condition of law, that his will should be revoked. Besides, it is clear that the children intended by him in his will were *natural* children, and the law will not take cognizance of those as of legitimate children. Bastards are excluded from succession. The law will not raise an use in favour of them under a covenant to stand seised to uses(a). Courts of equity proceeding on the same distinction, will supply the want of a surrender of a copyhold to make good a defective will or conveyance in favour of a legitimate, but not of a natural child(b). So a child born before marriage was holden, *Cartwright v. Vawdry*, 5 Ves. Jun. 530, not entitled to share with other children born after the marriage of the same parents, under a devise to *children* generally. Next, the charge on the real estate for payment of debts can make no difference: for the question is not, what the testator intended or ought to have intended, or what hardship or injustice may accidentally be worked in a particular case; but the revocation is a consequence of law, operating upon the events which have happened; upon the presumption that no man would leave his wife and children without provision. But considering the revocation on the ground of *intention*, the inclination to provide for creditors is not so strong as for children. Besides, it does not follow that though a man intended to revoke his will, he thereby determined not to pay his debts; for he might intend to do that in his lifetime, or by another will. At any rate, this would only apply to simple contract creditors, who may be considered as guilty of laches in not recovering their debts, or getting security for them. He also adverted to the evidence of intent, to be collected from the particular declarations, on which he commented; and observed, that it might be as well contended to be sufficient if the testator had left a written paper unattested, expressing that he had originally made his will, without adverting to his subsequent marriage, &c. which would revoke it; but that having found that the provisions contained in it were equally convenient to his then altered state, he thereby declared that his will should be revived as applicable to such state. But that would directly militate against the letter of the statute of frauds and the received construction of it. 2dly, This being the case of a revocation by presumption of law cannot be rebutted by evidence of a particular intent that the will should stand. Many cases of implied revocations must happen, which cannot go upon the ground of a subsequent *intention* in the testator to revoke; as where the pregnancy of the wife is unknown to the husband before

(a) *Worsley's case*, Dy. 374. 1 Ander. 79, S. C. and other cases collected by Mr. Hargrave in a note to Co. Litt. 123. a.

(b) *Parsaker v. Robinson*, 1 Eq. Cas. Abr. 122, recognized in *Tudor v. Anson*, 2 Ves. 582.

his death : or if known, and the intention to revoke then attaching, and continuing to his death, the will could not be set up again by a miscarriage subsequent to the husband's death. These implied revocations then can only stand consistently with the statute of frauds, on the ground stated in *Doe v. Lancashire*, namely, of a tacit condition annexed to the will at the time of its execution, and not on the presumption of a subsequent intention to revoke, which might with more reason be rebutted by evidence of a contrary intention. Putting the doctrine of such implied revocations on the ground of such tacit condition presumed by law gets rid of much of the difficulty arising upon the statute of frauds ; because the facts of marriage and the birth of a child being notorious, cannot be fabricated by means of frauds and perjuries, which the statute meant to guard against : but all these mischiefs will be let in again if recourse can be had to evidence of declarations in order to rebut the legal presumption. The mere existence of the will does not aid the presumption arising from such conversations ; otherwise it would be evidence of a re-publication, which it is not (a) ; though that would be a less dangerous innovation on the principle of the statute of frauds. In several cases the opinions have fluctuated whether parol evidence may be admitted to rebut an implied revocation ; Lord C. J. *Eyre* in *Goodtitle v. Otway*, 2 H. Blac. 522, thought they might : but Lord *Alvanley*, when Master of the Rolls, thought otherwise in *Gibbons v. Caunt*, 4 Ves. jun. 818, and so did the Lord Chancellor in this very cause, 5 Ves. jun. 864. It is true, that in the report of *Lugg v. Lugg* in Lord *Raymond*, 1 Ld. Ray. 441, such evidence is said to be admissible, but no notice is taken of that in the report of the same case in *Salkeld*, 592. And at any rate, it was extrajudicial ; for the will was ultimately revoked. The only express authority, therefore, for the reception of such evidence, is that of *Brady v. Cubitt*, Dougl. 31, which has been since questioned in the instances before mentioned : and there was another decisive ground for that determination, independent of the admissibility of this sort of evidence, namely, that the will, if revoked, was set up again by the subsequent codicil properly executed, which referred to it.

Barrow, in reply, urged that either the case was altogether within or beside the statute of frauds : if within it, the will must stand good, not being revoked by any of the means therein pointed out. If beside it, and implied revocations were to be admitted upon evidence of facts dehors the will, by the same rule counter evidence was admissible to rebut such implication. That this had been expressly decided in some cases, and never judicially determined otherwise. That here the children being legitimate, it was unnecessary to enter into any legal reasoning upon the difference between those and illegitimate children ; and that in *Brady v. Cubitt* Lord *Mansfield* put this very case of a provision by will for children *when he should have any*, and concluded that a subsequent marriage and birth of children would not be a revocation of such a will.

Curia advisare vult.

LORD ELLENBOROUGH, C. J. now delivered the judgment of the Court. After stating the case, and the 6th section of the statute of frauds (29 Car. 2, c. 3,) which enacts, that "no devise in writing of lands, &c. nor any clause thereof, shall at any time after, &c. be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent," &c.—He proceeded thus :

The difficulty of reconciling the doctrine of implied or presumptive revocations of a will of lands with the express provisions of that section was origin-

(a) He referred to *Atherley* and *Vernon* and the cases there cited (Com. Rep. 381, and other books) as establishing this against *Hall v. Dunch*, 1 Vern. 329, and other cases where parol declarations were received as evidence of republication.

ally very considerable. This point, however, namely, that such revocations are not excluded by the statute of frauds, has been considered as settled ever since the case of *Christopher v. Christopher*, in the Exchequer in 1771; by which revocations of wills, (implied not only from contradictory acts inconsistent with the existence of the will and its operation upon the property devised, as feoffments made, or recoveries suffered, of the lands devised, though to the same uses as before; and bargain and sale, though without enrollment,) have been sustained: but revocations have been also holden to be necessarily implied or presumed from so material a change in the circumstances of the testator as is occasioned by subsequent marriage and the birth of a child. The doctrine of implied revocations, originally borrowed from the civil law, and applied to bequests of personal estate, (as in the case of *Overbury v. Overbury*, 2 Show. 242, and *Lugg v. Lugg*, 1 Lord Raym. 441, and Salk. 592,) has been since denied in some degree by the Court of Common Pleas in *Driver v. Standring*, 2 Wils. 90, and much doubted by Lord Hardwicke in *Parsons v. Lanoe*, 1 Ves. 191, in its application to devises of land. That it is however applicable to devises of land has been so solemnly settled upon argument in the case already mentioned of *Christopher v. Christopher* in the Exchequer in 1771, and has since so frequently recognized in different courts at various times; as for instance, at the Cockpit in *Spragg v. Stone* in 1773; in the King's Bench, in the cases of *Brady v. Cubitt*, Dougl. 31, and of *Doe v. Lancashire*, 5 Term Rep. 49.; and upon many other occasions; that it must now be considered as a general proposition of law, that marriage and the birth of a child, *without provision made for the objects of these relations*, of themselves operate a revocation of a will of lands. The doctrine of implied or presumptive revocations seems to stand upon a better foundation of reason as it is put by Lord Kenyon in *Doe v. Lancashire*, 5 Term Rep. 58, namely, as being "a tacit condition annexed to the will when made, that it should not take effect if there should be a total change in the situation of the testator's family;" than on the ground of any presumed alteration of intention; which alteration of intention should seem in legal reasoning not very material, unless it be considered as sufficient to found a presumption in fact, that an actual revocation has followed thereupon. But upon whatever grounds this rule of revocation may be supposed to stand, it is on all hands allowed to apply, (and upon this subject particularly after what was said by Lord Mansfield in *Brady v. Cubitt*, Dougl. 39,) only in cases where the wife and children, the new objects of duty, are wholly unprovided for, and where there is an entire disposition of the whole estate to their exclusion and prejudice. This however cannot be said to be the case where the same persons, who after the making of the will stand in the legal relation of wife and children, were before specifically contemplated and provided for by the testator, though under a different character and denomination. There is not, therefore, in this case that total change in the situation of the family, and that total destitution of provision for those who ought to be objects of the testator's care and protection (although the provision be made for them under a different character), which can vacate the will on the ground of a supposed tacit condition that it should be void upon a total change in the situation of the testator's family, and a total want of provision for the family so newly circumstanced; or upon the ground of a presumed intention to revoke, according to any rules of law hitherto recognized on this subject. Indeed, it is not very easy to comprehend the legal effect of an intention to revoke, unless manifested and carried into execution by some act *in pais*. It is certainly true, that the law is not as favourable to bastards not *in esse*, as it is to legitimate children. In a variety of cases it will not raise an use in their favour, in consideration of blood, upon a covenant to stand seised to uses: nor will the want of a surrender of copyhold to the use of a will be supplied in favour of a natural child: nor can such child properly take by the description of *issue*. And in other cases also from un-

certainly in the terms of description of and reference to its *parents*, a bastard is prevented from taking at all. As however in this case the children were, at the time when the will speaks, *viz.* at the death of the testator, born and legitimate, no question of defective description, arising out of the words, "*in case I shall have any child or children by her,*" can be made. Nor was the policy of the law respecting marriage eventually, contravened in this case (upon which point the case in *Cro. Eliz.* 510, proceeds); inasmuch as the children who now claim under the will were not unborn bastards, but born and legitimate at the death of the testator. After what has been said already, and that the will in question is not under these circumstances vacated, on the ground of any tacit condition annexed to the will at the time of its making, nor on the ground of any intention to revoke to be presumed in favour of a wife and child or children unprovided for, (the fact upon which such presumption could be formed not existing in the present case); it becomes unnecessary to consider, whether the revocation generally holden to arise from subsequent marriage and the birth of a child, without provision made for the objects of these relations, can be *rebutted by parol declarations* in favour of the will. It is enough to say, that if a revocation, which would otherwise be implied, can be so rebutted, it is so rebutted in the present instance: for it is stated that about five months before the testator's death in a conversation with his wife in the presence and hearing of *Joseph Simpson* her father, upon her requesting him, (the testator,) to alter her maiden name as it then stood in his will to her then married name of *Pierson*, he said, *that it was not of any consequence; for that he had consulted a professional gentleman, who had told him that the will as it then stood was a good and sufficient will, and observed that he had thereby amply provided for her and her children.* Upon the whole, therefore, if there be any question which at this time of day can be agitated with effect, whether implied revocations of wills of land can be allowed at all consistently with the statute of frauds, our decision leaves even that question untouched; inasmuch as we sustain the will as yet in force and unrevoked by any implication whatsoever. Neither does our decision clash with the doctrine of a tacit condition annexed to the will, *viz.* that it should be void in the event of a marriage and children *without provision*; inasmuch as that condition, *viz.* of marriage and of the birth of children unprovided for, has not taken effect in this instance. And the question; how far implied revocations are competent to be rebutted by the parol declarations of the testator, is also left untouched for the reason before given. Therefore, without impugning any one decision upon the subject, and in conformity with them all, upon whatever various grounds they may have proceeded, we feel ourselves warranted in considering this will, made in favour of those who at the time of the testator's death had become his wife and children, as in full force and not revoked under the circumstances stated in this case.

Postea to the Plaintiff(1).

Barclay v. Cousins.

2 East, 544. July 3, 1802.

The profits of a cargo employed in trade on the coast of *Africa* are an insurable interest.

THIS was an action on a policy of insurance, dated the 27th *August*, 1799, and effected by the plaintiff as agent for and on account of one *Richard Wells*

(1) [As to the admissibility in evidence of parol declarations of the testator, in order to rebut implied revocations of wills. See 1 Phill. Eccl. R. 339. 460. 469. *Holloway v. Clarke*, *Johnston v. Johnston*.—W.]

on the ship *Jonah*, at and from *Barbadoes* to the coast of *Africa*, during her stay and trade there, and at and from thence back to her port or ports of discharge in the *West Indies*, at a premium of 25 guineas per cent. with various returns for convoy. The policy was declared to be *on profits valued at 2000l.*, and was underwritten by the defendant. The declaration contained averments that the ship sailed upon the voyage insured with a cargo of goods and merchandizes on board; and that the said *Richard Wells* was interested in the profits to arise and be made from the sale and disposal of the said cargo of goods and merchandizes to the amount insured; and stated a total loss by capture. The defendant pleaded the general issue, and paid the premium into Court. At the trial before Lord *Kenyon* at the sittings at *Guildhall* after last *Trinity* term, a verdict was found for the plaintiff for 221l. 6s. subject to the opinion of this Court on the following case.

In *February* 1799, *Richard Wells* shipped a cargo of goods on his own account on board his own ship the *Jonah* at *Barbadoes*, to be carried on a trading voyage to the coast of *Africa*. The invoice value of the ship and cargo was about 5880l. In *April* 1799, the plaintiff received an order from Mr. *Wells* to insure 6000l. on this ship and cargo; in consequence whereof he effected an insurance to the amount of 8470l. to cover the sum of 6000l. ordered and the premiums of insurance thereon; which insurance was declared to be on the ship and cargo at and from *Barbadoes* to the coast of *Africa*, during her stay and trade there, and at and from thence back to her port or ports of discharge in the *West Indies*. On the 13th of *August* following, the plaintiff received a letter from Mr. *Wells* directing the insurance in question, which was thereupon accordingly effected. The said ship sailed from *Barbadoes* on the 29th of *March* 1799, upon the voyage insured, and arrived at *Cape Mount* her port of discharge in *Africa* on the 21st of *July* following; and thereupon the agents of the assured began to unload and sell her cargo, and with part of the produce thereof purchased 30 slaves; and on the 28th of *August* following, she was captured by three *French* frigates, but was afterwards given up to one *George Hewitt* for the purpose of conveying *English* prisoners to a *British* port, and arrived at *Sierra Leone* on the 6th of *September*, together with the said thirty slaves, and the remainder of her cargo, and a number of *English* prisoners; but was soon after deserted by the said *George Hewitt* and part of her crew; and her original captain refusing to take the charge of her, Captain *Gray*, the then acting governor of that settlement, gave the command thereof to one *Walter Stott*, who accordingly took possession thereof. That by the direction of the said *Walter Stott* the 30 slaves were unshipped, and sent to *Bance Island*, where they were afterwards sold, and the remainder of the cargo was landed and sold at *Sierra Leone*, and produced the sum of 46l. 6s. 6d. That the said brig afterwards departed for *Barbadoes* with prisoners on board, where she arrived, and where the Court of Admiralty adjudged to the said *Walter Stott* and the then crew of the said brig one full eighth part of the net proceeds thereof, and of the cargo on board her at the time she was taken possession of as aforesaid. The question for the opinion of the Court is, whether the plaintiff is entitled to recover.

This case was very fully argued first in *Easter* term 41 Geo. 3. by *J. B. Warren* for the plaintiff, and *Giles* for the defendant; and again in the last *Easter* term, by *Park* for the plaintiff, and *Adam* for the defendant; but as the principal arguments and authorities were noticed by the Court in their judgment, which they took time to consider of till this term, it is unnecessary to state them in another form.

LAWRENCE, J. (in the absence of *Grose*, J. who was indisposed) now delivered the opinions of *Grose* and *Le Blanc*, Justices, and his own.

The case states, that the insured shipped on board the ship *Jonah* a cargo

of goods to be carried on a trading voyage; so that it appears that he had an interest in the profits to arise from a cargo which was liable to be affected by the perils insured against. And the question is, if on an insurance made on the profits to arise from such cargo the plaintiff can recover? As insurance is a contract of indemnity it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages, which, but for the perils insured against, the assured would not suffer: and in every maritime adventure the adventurer is liable to be deprived not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port. If they do not arrive, his loss in such case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain without more risk than the capital itself would be liable to: and if when the capital is subject to the risks of maritime commerce it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks? It is surely not an improper encouragement of trade to provide that merchants in case of adverse fortune should not only not lose the principal adventure, but that that principal should not in consequence of such bad fortune be totally unproductive: and that men of small fortunes should be encouraged to engage in commerce by their having the means of preserving their capitals entire, which would continually be lessened by the ordinary expences of living, if there were no means of replacing that expenditure in case the returns of their adventures should fail. Where a capital is employed subject to such risks, in case of loss the party is a sufferer by not having used his money in a way, which might with a moral certainty have made a return not only of his principal but of profit: and it is but playing with words to say, that in such case there is no loss because there is no possession, and that it is but a disappointment. Foreign writers upon insurance, whose doctrines from the greatest part of our law on this subject, certainly do not treat of insurance on profits as a matter inconsistent with the true nature and design of such a contract, and where it is spoken of by them as a species of insurance which cannot be made, this latter doctrine will be found to be referable to the positive institutions of different nations, who have thought it wise to prohibit it. *Roccus* an *Italian* jurist, inquiring how goods that are lost are to be valued, has in his *Notabilia de Assecurationibus*, No. 3, this passage “*dictingue aut merces fuerunt æstimatæ pro certa quantitate tempore contractus assecurationis, et tunc non sumus in dubia quia dicta quantitas æstimata solvenda est; aut assecuratio fuit facta pro asportandis mercibus salvis Romam, et tunc æstimatio inspicienda est Romæ.* Aut assecuratio fuit facta *simpliciter*, de solvendo æstimationem seu valorem mercium, in casu periculi, si navis perierit, & tunc inspici debet tempus obligationis, & prout tunc valebant, debet fieri æstimatio, et sic *damnum* quod assecuratus patitur in amissione rei, non *lucrum* faciendum consideratur.” And for this he cites *Santerna*, a *Portuguese* lawyer, *de Assecurationibus*, part the 3d, num. 40. and 41, in which book there is a long disquisition to shew that in this latter case the profit on the goods is not to be paid, but only the value at the time of the insurance. So that it seems the insurance of profits is so far from being inconsistent with the nature of insurance, that *e contra* *Santerna* thinks it necessary to shew by argument that the profit is not to be considered in all cases; and that where the assurance is made *simpliciter*, then *lucrum non spectatur*. And *Stracca*, another *Italian* lawyer, agrees with *Santerna* in his Gloss, No. 6. In *France*, such assurances were unlawful; but that depends according to *Valin* on the ordinance of the marine, which also forbids insurance upon freight: and the reason given by *Valin* for making those ordinances with respect to the one and the other is the same. So in *Holland* it

appears from *Bynkershoek's Questiones Juris privati*, book 4. c. 5, that such insurances cannot be legally made there; but that is by the positive laws of that country; notwithstanding which the practice has so generally obtained to insure expected profits, as that in a case, he there states, the majority of the Judges of the court, where the question arose, determined in favour of the assured; and those who opposed that decision rested their opinions on the positive laws of the country, and not on such contracts being contrary to the nature of insurance. In this country, there is no law forbidding such insurance, unless it could be shewn that the insurer had no interest in the profits, or that from its nature it must be a mere wager, so as to bring the case within the stat. 19 Geo. 2. And that they are not considered as contracts inconsistent with the general nature of insurance is proved by the instance put of an insurance on freight; which, as was very truly argued at the bar, differs only from the case now before us in the same degree as a return of capital vested in shipping differs from a return of capital vested in merchandize; and by the cases of *Grant* and *Parkinson*, in *Marshall*, 111. and *Park*, 267. which was an insurance on the profits of a cargo of molasses; and of *Henrickson* and *Walker*, and *Henrickson* and *Margetson*, Mich. 1776(a). The authority of *Grant* and *Parkinson* as applied to this case has been attempted to be gotten rid of by observing that the thing insured there was the profits of a specific cargo; but in that respect the two cases do not differ: for this is an insurance on a specific cargo; and we have no ground to say, that the profits of a cargo to be exchanged in the *African* trade, from which exchange the profits will arise, are not, to use the expression of Lord *Mansfield* in *Grant* and *Parkinson*, pretty certain; admitting for the sake of the argument, which it is not necessary for us now to determine, that in some mercantile adventures there may be so much uncertainty as to the profits, as to make it not possible to insure them without the policy being a wagering contract. This, however, we cannot presume of the returns to be made from an adventure undertaken according to a long established course of trade like that in question, in which numbers have been engaged to great advantage for a continued succession of years. It has been objected to this sort of insurance, that the subject having

(a) Mr. Justice *Lawrence* read the following note of that case at the time.

Henrickson v. Margetson—and the same against *Walker*. These were two actions on the same policy against two different underwriters. It was a policy of insurance at and from *Bourdeaux* to *Hamburg*, on imaginary profit. The declaration stated the policy 14th December, 1775, on the ship *Thomas of Bremen*, on indigo valued at 9600*l*. under which policy was a memorandum, viz. the following is on imaginary profit at 3 1-2 per cent, and in case of loss to pay without further proof of interest than this policy. The plaintiff averred, that the ship was not a ship belonging to his Majesty or any of his subjects; and that the imaginary profit mentioned in the said memorandum was and is understood and meant to be the profit which the said cargo of indigo would produce upon the sale thereof at *Hamburg*, if the same should arrive there in safety. That the defendant became an assuer of 200*l*. on the said imaginary profit; that the cargo of indigo was on board to the value insured; and that the plaintiff was interested in the cargo of indigo and the imaginary profit thereof; and that the ship and cargo were on the voyage lost by perils of the sea; and the cargo and all profit thereof wholly lost to the plaintiff.

The cause was tried at the Sittings after Trinity term 1776 at *Guildhall*, before Lord *Mansfield*, when a verdict was found for the plaintiff.

In *Michaelmas* term 1776, a motion was made for a new trial. It appeared by the report, that the ship was totally lost off *Scilly*; but that all the cargo except one barrel of indigo was saved and carried to *Hamburg* in another ship, at the expense of the underwriters. And the question made on the motion for a new trial was, whether the ship being lost, but the cargo carried to *Hamburg* in another ship, the assured could recover as for a total loss of the profits. But *The Court* held, that there should not be a new trial: that the underwriters were not at liberty to send the cargo to *Hamburg* at what time and in what ship they pleased. Lord *Mansfield* said, the meaning of the policy seems to be, that the ship and cargo shall arrive at the destined port, and is on the profit of that particular ship and cargo: but the market varies, and may depend on 24 hours sooner or later: so that unless the very ship and cargo arrive the profit may fail, and the insurance is lost.

Rule discharged.

no physical existence cannot be insured. This objection would hold against insuring freight and bottomree and respondentia interest. Again, that the goods might be going to a losing market, in which case the assured would gain by the loss of his goods: but if that were the case, it would be evidence on *non assumptis*, as it would prove either that the plaintiff was not damaged as to profit by the loss of the goods; or that at the time of the loss, he had no interest in the thing insured(1). It was further objected, that there can be no average nor abandonment: but that objection does not hold in the present case; for if there be only a partial loss, the assured will only be liable to pay for the expected profits on the goods lost, and there may be an abandonment of the profits by abandoning the goods from whence the profits are to arise. And as to general average, there would be no difficulty in the case of a valued policy: and in the case of an open policy the difficulty would be no greater than in ascertaining the damages in case of loss; the impossibility of doing which in every case will not prove that an insurance can be made on profits in no case. A considerable time has elapsed between the first and second argument of this case in consequence of a writ of error in the Exchequer-chamber in another case, the decision of which might have had weight in favour of the defendant had it been determined otherwise than it has been. The grounds of that decision we are not acquainted with, so as to say whether they will support this case; but as that determination does not militate with the opinion Mr. J. Grose, Mr. J. Le Blanc and I have formed, and I may add that of Lord Kenyon on hearing the first argument, we do not think it fit that we should longer delay the judgment of the Court.

Postea to the Plaintiff(2)(3).

Scammell and Others. v. Wilkinson and Another.

2 East, 552. July 3, 1802.

Prohibition lies to the Spiritual Court, if a suit be instituted to obtain a *general* probate of the will of a woman made during her coverture, though with her husband's consent, and though she survived him: for he could not by any assent of his enable her to dispose by any will made during the coverture of property which she might acquire after his death, but only of property over which he himself had a disposing power. But a feme covert may make a will disposing of property which she only has in *autre droit*, as executrix, without her husband's consent.

THE plaintiffs declared in prohibition, and stated that the defendants *Catherine Wilkinson* and *John Bagwell* instituted a suit in the Prerogative Court of the Archbishop of *Canterbury* against *Susanna Scammell* and the other plaintiffs, being next of kin of *Sarah Pearce*, for the purpose of their (the defendants') bringing into and leaving in the registry of the said Prerogative

(1) Vide *Hodgson v. Glover*, 6 East 817.

(2) Vide *Abbot v. Sebor*, 3 Johns. Ca. 39. *Tom v. Smith*, 3 Calnes 245. *Mumford v. Hallett*, 1 Johns. Rep. 433. *Fosdick v. The Norwich Marine Insurance Company*, 2 Day 108. See also the cases referred to in the editor's note to *Puller & al. v. Glover*, 12 East 129.

(3) [Profits are a frequent, and well settled subject of insurance in the *U. States*; and this particular species of insurance partakes not at all of the nature of gambling, provided the assured have an interest in the cargo. In this country, too, it is held not to be necessary to shew that there would actually have been a profit on the goods shipped in order to constitute an insurable interest in profits. *Loomis v. Shaw*, 2 Johns. Cases, 36. *Abbot v. Sebor*, 3 do. 39. *Mumford v. Hallett*, 1 Johns. 433. 439. *Fosdick v. Norwich M. Ins. Co.*, 2 Day, 108. *Palapico Ins. Co. v. Coulter*, 3 Peters, 222. *Alsop v. Com. Ins. Co.*, 1 Sumner, 451.

Profits are generally insured under valued policies. *Livingston, J.*, in *Mumford v. Hallett*, above cited, says, that every such insurance must, of necessity, be considered as a valued and not an open policy.—W.]

Court the probate of the pretended last will and testament of the said *S. Pearce* widow, deceased, theretofore granted to the said *Catherine Wilkinson* (theretofore *Catherine Pearce*, spinster); and the said *John Bagwell*, the executors named in the said pretended will, under certain *limitations* therein set forth; and of shewing cause why the same should not be revoked and declared void, and why a general probate of the said pretended will should not be granted to the said executors; alleging as a ground for granting such a general probate, that one *William Stevens*, then deceased, whilst living made his will, dated the 28th of *December 1776*, and therein appointed his sister *Sarah Pearce* deceased, then the wife of *Richard Pearce*, his sole executrix and residuary legatee; who, in *September 1782*, duly proved the said will of her brother; and that her husband *Richard Pearce* made his will dated the 23d of *January 1789*, and thereby gave the residue of his personal estate to his wife (*Sarah Pearce*) for her sole use and benefit; and, in case of her decease in his lifetime, gave the said residue to the executors or administrators of his wife; directing the same to be disposed of in such proportions manner and form as his wife by her last will, or any writing purporting to be her last will, and executed by her either in his lifetime, or after his decease, should give direct or appoint. And that by his said will he authorized and empowered her to make any such will for the purposes aforesaid. And that the said *Richard Pearce* appointed the said *Catherine Wilkinson* (then *Catherine Pearce*) and *John Bagwell* executors and trustees for his said wife. Alleging further, that on the said 22d of *January 1789*, the said *Sarah Pearce* did, with the privy consent and approbation of the said *Richard Pearce*, her husband, make and duly execute her will in writing, which will was read over in the presence of her said husband, who testified his consent to such will, and his approbation thereof, by subscribing his name thereto as a witness, and that the said *Sarah Pearce* did thereby dispose of the rest residue and remainder of her estate whereof she might be entitled to at the time of her decease, or over which she might have any power to dispose, either by the will of her husband, or by or under the will of her late brother *William Stevens*, or by any other means whatsoever, unto the said *Catherine Pearce* (now *Wilkinson*); and appointed her and *John Bagwell* the executors. That *Richard Pearce* died on the 28th of *February 1789*, in the lifetime of the said *Sarah Pearce*, who survived her husband 12 hours, and died without revoking her will; and that in *March 1789*, the said *Catherine Wilkinson* (then *Catherine Pearce*) and *John Bagwell* proved the said will of the said *Richard Pearce*; and that in the same month probate of the will of the said *Sarah Pearce* was incautiously granted to *Catherine Wilkinson* (then *Pearce*) and *John Bagwell*, with a limitation to the rights and interest which she took under the will of her husband: whereas she died testate to all intents and purposes whatsoever, possessed of and entitled to certain property which could not be administered under the limitations of the probate. And on these grounds the libel prayed, that the Judge of the Prerogative Court would revoke the probate of the will of the said *Sarah Pearce*, and grant to the said executors a general probate of the said will without any limitation whatsoever. The declaration further stated, that in answer to this allegation the plaintiffs pleaded, that *Sarah Pearce* being a married woman could not make a will but by the authority of her husband, and that her husband gave her no such authority; for that his assent became wholly ineffectual by reason of her having survived him; and that his attesting her will was evidence of his assent so far only as *Sarah Pearce* had bequeathed and disposed of such effects as *Richard Pearce* had then the power of disposing of by his own will: and that her will was valid only as to such estate and effects as by virtue of the will and testament of her husband she had a power to dispose of: notwithstanding which answer and his Majesty's writ of prohibition the said *Catherine Wilkinson* and *John Bagwell* are proceeding to obtain such general probate, &c.

To this declaration the defendants pleaded, that *William Stevens* in the said recited libel mentioned made his will on the 28th of *December 1776*, and thereby appointed his sister *Sarah Pearce*, then the wife of *Richard Pearce*, sole executrix and residuary legatee as above alleged : that *Richard Pearce* and *Sarah Pearce* made their respective wills as stated in the libel : and that the will of *Sarah Pearce* was fully understood and assented to by her husband in every disposition, matter and thing therein contained ; wherefore, they prayed judgment and his Majesty's writ of consultation to be granted, &c. To which there was a general demurrer and joinder in demurrer.

This case was first argued in *Trinity* term last, by *Littledale* in support of the demurrer, and *Wigley* contra ; again in *Michaelmas* term last, by *Gibbs* in support of the demurrer, and the *Attorney-General* contra ; and a third time in the last term, by *Civilians*, namely, by *Dr. Lawrence* in support of the demurrer, and *Dr. Swabey* contra.

The Court took time to consider of their judgment : and now

LAWRENCE, J. (in the absence of *Grose, J.* who was indisposed) delivered the opinion of *Grose* and *Le Blanc*, Justices, and his own : *Lord Ellenborough, C. J.* having been engaged as counsel in the cause when it was argued the two first times.

After stating the pleadings as before set forth—The question is, Whether under the circumstances a general probate ought to be granted of the will of *Mrs. Pearce* ? And if not, Whether there ought to be a writ of prohibition directed to the Judge of the Prerogative Court in which the suit is pending ?

In this case property of three different descriptions may be in question. 1st, That which was the property of the husband *Richard Pearce proprio jure*. 2d, That which passed by the will of *William Stevens* ; part of which may have been reduced into possession in the lifetime of *Richard Pearce*. 3dly, Property which *Sarah Pearce* the wife may by possibility have acquired subsequent to her husband's death.

Over the first she could have no power of disposition but what might be acquired by her husband's assent. Over the second she had a power without her husband's assent to transmit by will what was not reduced into possession, to some other, to whom it would pass by right of representation to her brother the former owner ; but that which was reduced into possession must pass as the first description of property, which was the husband's *proprio jure*. This doctrine is to be found in *Swinburne* 82, and in what *Lord Thurlow* says in *Hodson v. Lloyd*, 2 *Brown*. 543. Over the 3d description of property she could have no power of disposition derived from her husband ; for as he never had any interest in it, she can derive no power from him ; and as she had in respect thereof no representative power of transmissiion, the question as to the 3d description must stand on the foot of a will made by a feme covert. As to which *Swinburne* says, *part 2d, c. 9. numero 6*. " Though the wife do overlive the husband, yet the testament made during the marriage is not good ; the reason is yielded before ; because she was intestable at the time of the will making." And according to 4 *Co.* 61 b. " the law of *England* will not allow of any custom that a feme covert may make any devise ; for the presumption that the law has that it will be made by the constraint of the husband." And if this reason be applied to testaments she can make none, unless it be by the consent of the husband and to his prejudice ; in which case a restraint cannot be presumed. And according to the case referred to in *Brown* the general rule is, that a feme covert cannot make a will without the consent of her husband but of things *in autre droit* ; and the argument of one of the learned *Civilians* who assisted us by the information he gave, by which he would distinguish the next of kin from the husband, *scil.* that they have no rights but in cases of intestacy, does not hold throughout : for as to things in action the husband can only claim as the next of kin does, *scil.* as the administrator of the wife. If then a feme covert

cannot make a will without her husband's assent, except of things she has as executrix, and if the effect of a general probate would in this case operate on goods of the 3d description, i. e. on goods acquired after the husband's death, such general probate should not be granted. And though, generally speaking, the Ecclesiastical Court has exclusive jurisdiction over the wills of all persons dying in a testable state, yet where on the pleadings the object of the Ecclesiastical Court must be taken to be the establishment of the will of a person not in a testable state at the time of the making it, the question is to be considered just as if she had continued in such state to her death; for the object of the Court is to give effect to a will, which by the general rules of law can have no effect. Formerly where the will was not only of personalty, but also of lands, prohibition used to be granted *quoad* the lands. 2 Roll. Abr. 315, b. 10. But that is not so done now; as the probate as to the lands is no evidence either way, being a proceeding *coram non judice*, Salk. 552. So that where the matter is partly within their jurisdiction and partly not, a prohibition may be granted as to that which is not, if it will answer any purpose. How then does this case stand? as to the will, *quoad* the husband's effects and those of *William Stevens*, a limited probate or administration *cum scripto annexo* may be granted, but not as to the effects acquired subsequent to the husband's death: and if the Ecclesiastical Court should grant it, it will not be in vain, as being upon the face of it a proceeding *coram non judice*, as in the case of lands, and therefore the prohibition not unnecessary. And as to the argument that the Prerogative Court will not grant probate further than they ought to do, that would apply against granting prohibitions in all cases before sentence. But the rule is, if it appear by the libel that the matter be not within the jurisdiction of the Spiritual Court, a prohibition lies after sentence or before. And where the matter for prohibition appears on the face of the libel, it need not be pleaded. Salk. 551. In this case on the face of the proceedings it appears that the Prerogative Court is applied to, to grant a probate which will give to a will made by a woman during her coverture the effect of a will made during her widowhood and discovery. And it is not impossible but that the Ecclesiastical Court may in this case grant such probate: for by the civil law a feme covert might make a will, and so she might by the canon law. Lindwood 173. But as Mrs. *Pearce*, besides what she could dispose of by the will of her husband, to which the limited probate is confined, had a power to make a testament and appoint an executor of the goods she had as executrix, to which that probate does not extend, the probate to be granted in this case may be more extensive than what the plaintiffs insist it should be. But of that it will be to be judged by the proper Court when such further limited probate is applied for(1).

The King v. The Inhabitants of Kirdford.

2 East, 559. July 23, 1802.

A parishioner having rateable property in the parish, but omitted to be rated for the purpose of making him a witness upon a question of settlement between two parishes, is a competent witness for the parish in which he is so liable to be rated.

ON an appeal against an order of two justices for the removal of *Murgaret* the wife of *John Jeale* and her three children from the parish of *Kirdford*, in the county of *Sussex*, to the parish of *Ripley*, otherwise *Send*, in the county of *Surry*; the respondents, in order to establish a settlement of *John Jeale* in *Ripley*, called one *H. Luff*, who was the occupier of a rateable tenement in *Kirdford*, but who was not rated in the last poor-book made for that parish,

(1) Vide S. C. 2 East 202, on a question of costs.

nor in any rate made since the 19th of *February* 1801. It was admitted, that *Luff* was left out of the several rates for the express purpose of qualifying him to be a witness in any appeal which might take place respecting the settlement of *Jeale* or his family, which settlement had then become an object of litigation. The sessions rejecting the testimony of *Luff* as incompetent, and the respondents not being able to prove their case in any other manner than by his testimony, the order was quashed, subject to the opinion of this Court, Whether upon the facts above stated *Luff* was or was not a competent witness.

Rose and *Courthope*, in support of the order of Sessions, contended that the witness *Luff* was incompetent, on the ground of having an interest in the question before the Court; and distinguished this case from that of *R. v. Prosser*, 4 Term Rep. 17, which was on a question of rating; where the appellants themselves objected to the rate because they were omitted, and called a witness who had himself rateable property in the parish, but was not rated, in order to prove their own rateability. *Buller*, J. observed, that though the appellants succeeded, it would not follow that the witness ought to be rated: and there too, if the appellants thought proper to waive the objection to the witness's interest, no other party had any right to object to him. But here the decision of the question involves in it a burthen on the parish as permanent as the witness's interest, and therefore he is eventually interested in the consequences, as he may be put on the next rate while the same burthen subsists. It is an additional reason for rejecting the witness's testimony, that the parishioners, by whom he was called, have intentionally omitted him in the rate, in fraud of the statute 43 Eliz.; and though in the case of the *Sadler's Company v. Jones*, 6 Mod. 166, it is said that three of the company were disfranchised in order to give evidence; yet it is noted that they declared upon the *voir dire* that they had no assurance of being received again. And in *Brown v. The Corporation of London*, 11 Mod. 225; Lord *Holt*, under similar circumstances, rejected the witness, because the judgment of disfranchisement, being erroneous for want of a summons, might be avoided. Here then, no assurance by the parishioners could prevent the witness from being put on the rate, and the omission may be supplied on appeal; and here the interest is not destroyed, but merely suspended. In actions on the statute of hue and cry, the Legislature found it necessary to make the hundredors competent witnesses, on account of their liability to a future rate.

Garrow, contra, was stopped by the Court.

LORD ELLENBOROUGH, C. J. In order to disqualify a witness on the score of interest, it must be an actual existing interest at the time, and not merely one that is expectant. The rule is well laid down in *Rez v. Prosser*, and in other cases, particularly one mentioned by Mr. Justice *Buller* in that case before Baron *Burland* at *Salisbury*, that a liability to be rated is no objection to the competency of the witness. Here it was perfectly contingent at the time whether the witness would be interested or not: he might die, or part with his property before the making of the next rate. The case put under the statute of hue and cry does not apply; for there, in truth, all the inhabitants are the real defendants in the cause, though as they could not all be put on the record, provision was made by the statute in that respect. It was therefore necessary to have an express law for making one a competent witness who was actually liable as a party at the time. It is said, that this is not like the case of disfranchising a corporator; but it is so; for, *pro tempore*, he is not interested: and the ground on which Lord *Holt* rejected the witness in the case alluded to, was because the judgment of disfranchisement was void for want of a previous summons to the corporator, and therefore he had not been disfranchised. Here the witness could not be rejected on the mere ground of an expectant interest.

LAWRENCE, J. This is attempted to be distinguished from the case of *Rez v. Prosser*, because that was on a question of rating: but in *Rez v. South*

Lynn, 5 Term Rep. 667, and *Rex v. Little Lumley*, 6 Term Rep. 157, which were questions of settlement, the same rule was adopted; and in the former Lord *Kenyon* said, that there was no reason to depart from the opinion given in *Rex v. Prosser*. The same point, which was ruled in the case mentioned before Mr. Baron *Burland*; was also ruled by Mr. Justice *Buller* in a case of *Deacon v. Cook*, Taunton Spring assizes 1789, where the question was upon the boundaries of two adjoining parishes. He held that a parishioner actually rated was not a competent witness to extend the boundaries of his parish, but he admitted such as were only liable to be rated.

LE BLANC, J. declared himself of the same opinion; and also referred to Lord *Kenyon's* opinion in *Rex v. South Lynn* as in point; and that there was no distinction between the admissibility of such a witness on questions of rate or questions of settlement. That by taking the witness off the rate his immediate interest was taken away: and that if there were any impropriety in the conduct of the parish in that respect, however it might go to the witness's credit, it could not make him incompetent(1).

Case remanded to the Sessions to be reheard.

Ex parte Sir Robert Mackreth, Kt.

2 East, 568. July 23, 1802.

Where the memorial of an annuity registered under the statute 17 Geo. 3. c. 26, stated, that "the bond, warrant of attorney, indenture, and deed poll, (given to secure the annuity) were witnessed by four persons;" that must be taken to mean that *each of them* were so witnessed; and therefore, if it appear by the answer on oath of the assignee of the grantee, that *three* of the instruments were attested by *two* persons only, the Court on application, though at the distance of near 20 years, and after the principal parties and witnesses to the transaction be dead, will set aside the warrant of attorney; the merits of such objection not depending on testimony lost by the delay.

THIS was an application by Sir *Robert Mackreth* to set aside an annuity for a defect under the stat. 17 Geo. 3. c. 26. s. 1, in not having distinctly stated in the memorial registered the names of the several witnesses to the several instruments for securing the annuity. The rule in form called upon Mrs. *Elizabeth Davenport* to shew cause why the bond, warrant of attorney, judgment and indenture in the memorial mentioned, should not be set aside. The facts appeared to be these; in April 1783 Sir *C. F. Ratcliffe*, for a valuable consideration, granted an annuity of 300*l.* to *W. Sampson* for the life of Lady *Ratcliffe*, with her concurrence, which was in part secured upon a sum of 10,000*l.* 3 per cent. reduced stock, in which she had a life interest. This annuity was assigned by *Sampson* several years before his death, which was in 1796, to *Eade*, and by *Eade* to Mr. *Davenport*, whose widow, the present claimant, derived title to it from him. Between the time of granting the annuity and the present application, the grantor and grantee, Mr. *Davenport*, Mr. *Constable*, the grantee's attorney who prepared the deeds, and Mr. *Powell*, one of the witnesses to the deeds, were all dead. Sir *C. F. Ratcliffe* having a reversionary interest in part of the stock after his wife's death, in 1795 sold the same to Sir *R. Mackreth*: and soon after a suit was instituted in the court of Exchequer by Sir *Robert* against Sir *Charles* and Lady *Ratcliffe* and their trustees, and Mrs. *Davenport*; in which it was decreed (in 1797) that the surviving trustee should transfer the principal stock to Sir *Robert* and certain other persons, in trust for the several subsisting interests; and it was then agreed between all the parties, that the trustees should pay over the

(1) Vide *The King v. The inhabitants of Killyerby*, 10 East 292, and the editor's notes thereto.

arrears of the annuity to *Mrs. Davenport*, and empower her banker to receive the growing dividends for her use: and the annuity was accordingly paid without objection till the year 1800. In 1797, it was agreed between *Sir R. Mackreth* and *Mrs. Davenport*, that she should release part of *Sir C. F. Ratcliffe's* estate which *Sir Robert* had also purchased, and on which she had a prior charge in respect of the annuity, he in return confirming the annuity, and giving his own bond in addition as a further security for it: which was accordingly done: and such further security was memorialized. In 1801, *Sir Robert Mackreth* filed a bill in Chancery against *Mrs. Davenport* and others to enforce a redemption of the annuity according to the terms of the securities as insisted on by him to that effect, to which she put in her answer (alluded to in part in the affidavit of *Sir Robert Mackreth* after mentioned): pending which suit *Lady Ratcliffe* died: and then the present application was made to this Court upon *Sir Robert's* affidavit, stating that at the time of granting the annuity the grantor executed a bond, and a warrant of attorney to confess judgment, and also a certain indenture assigning the dividends of the said 10,000*l.* stock, and a deed poll or letter of attorney, empowering the grantee *W. Sampson* to receive such dividends, all dated the 29th of April 1783. That in the memorial of the annuity it is stated, that "the said bond, warrant of attorney, indenture, and deed poll, "are witnessed by *J. J. Powell* and *J. Bowles, R. Pitches* and *T. Constable*, of," &c. That *Mrs. Davenport* in her answer, upon oath, put in to a bill filed against her and others by the deponent, admitted that the said bond, warrant of attorney, and indenture were in her custody: and further states as follows: "That the names of the subscribing witnesses to the said bond, "warrant of attorney, and indenture are, *J. Powell* and *J. Bowles*," of, &c.

The objection ultimately relied on^(a) was, that it must be taken on the face of the memorial, that all the four deeds therein mentioned as given for securing the annuity, were witnessed by the four persons whose names were recorded as witnesses; whereas it appeared by the admission of *Mrs. Davenport* herself on oath, that three of the instruments were only witnessed by two persons.

Garrow and *East* shewed cause against the rule, and objected to the Court's lending their aid to so state an application, at the distance of above 19 years, and after all the principal parties and witnesses were dead. These considerations have weighed with the Court in many cases to refuse the inquiry prayed for within a less period; as in *Pool v. Cabanes*, 8 Term Rep. 328, and *Ex parte Maxwell*^(b). And though no precise limitation of time has been laid down in this respect; yet Lord *Kenyon* in the latter case hinted a strong opinion that all objections *dehors* the memorial should be brought forward within six years, the usual period of limitation for personal actions, at least without strong reasons to the contrary. Now here the objection is not apparent upon the face of the memorial, but is brought forward by affidavit. Besides, according to several cases^(c), as the party applying might have brought forward the same objection, if any, in the suit in the Exchequer in 1795, and in the bill in Chancery in 1801, in both which the validity of this annuity was in question, he is now concluded, the matter having passed *in rem judicatam*. There is also an additional reason for not hearing any objection to the annuity from the present applicant, because he has paid no consideration for the fund out of which the annuity is payable, having purchased the reversion subject to this charge. And therefore, he is a mere volunteer with-

(a) Other objections were started, which with parts of the affidavits on which they were founded, and the answers given to them are not stated, as the opinion of the Court was confined to this point.

(b) *Ante*, 85.

(c) *Withers v. Woolley*, 7 Term Rep. 540. *Greathead v. Bromley*, ib. 455, and *Schuman v. Weatherhead*, ante, 1 vol. 537.

out any merits; and as the representative of Sir C. F. Ratcliffe are not before the Court, and make no complaint, it is not competent for any other to do so. [The Court said it was another question, whether if this party succeeded in setting aside the annuity, he would not be holden to be a trustee for the representatives of the Ratcliffe family, during the life of Lady R.; which would hereafter be settled between him and them, though they reprobated the present application very strongly.] 2dly. As to the legal objection to the memorial, there are *four* instruments stated therein to have been executed for securing the annuity, which are alleged generally to have been witnessed by four persons; and it appears that *three* of these were attested by two of the witnesses named; but *non constat* that the other, which is not in the possession of Mrs. Davenport, was not attested by the other two; and then the memorial, which must be taken *reddendo singula singulis*, will be accurate. The allegation is not that *each* of the instruments was attested by the four witnesses, or, as in *Hart v. Lovelace*, 6 Term Rep. 471, that *all* were so attested.

Erskine, Gibbs, and *Dampier*, contra, relied on the last-mentioned case as decisive of the objection taken: and said, that the word *all* was as fully understood in the allegation, that the four instruments by name were witnessed by the four persons, as if it had been expressed. They admitted, that at this distance of time the Court would probably not have entered into any objection to the merits of the annuity, which required to be made out by affidavits, and which those who are now dead might have explained: but the fact on which the present objection rested could not be explained away, and was admitted by Mrs. D. on her oath; therefore, there could not be greater certainty of the fact, if it had appeared on the face of the memorial itself.

LORD ELLENBOROUGH, C. J. I feel as much reluctance as a Judge ought to do in giving way to the objection which has been made: but the act of Parliament is imperative, and whilst it remains on the statute-book we must give it effect. Under the circumstances of this case I would look at nothing *aliunde* the memorial which was to be established by the evidence of the party applying: but the objection to not stating the witnesses to the several instruments *distributive* is made out by that sort of evidence which we ought not to resist, though it be an extrinsic fact. But for Mrs. Davenport's answer in Chancery, I should have been inclined to consider that the deeds had been afterwards re-executed by all the witnesses, in conformity with the description in the memorial: but we must, I fear, receive her answer as conclusive against that supposition, since she might have so stated it if the fact were so.

LAWRENCE, J. The act of Parliament has not prescribed any limitation of time within which applications of this sort must be made: but the Court have said that they will not entertain such applications after the death of the witnesses to the transaction, who could ascertain the truth of the case. But this objection does not depend upon any testimony, which could only have been given by persons who are dead: for the memorial itself states, that the instruments for securing the annuity were witnessed by four persons; and Mrs. Davenport shews by her answer, that three of them at least were only attested by two. If she had fallen into any mistake in that respect, it might easily have been corrected by the production of the deeds themselves. The reason, therefore, of the limitation which the Court have adopted in regulating their discretion does not apply to this case.

LE BLANC, J. I concur in the grounds stated for making the rule absolute, while I also join in reprobating the application. I am not aware of any decision where the Court have bound the party by lapse of time, unless where an answer might have been given to it at a former period, the opportunity of doing which was lost by the delay. That could not have happened in this case. With respect to the ground of objection, the same point was under con-

sideration, and the opinion of the Court expressed on it in *Hart v. Lovelace*, although that case was somewhat different from this.

Rule absolute for setting aside the warrant of attorney.

The Court expressed a wish that in future the grounds of application in cases of this description should be stated in the rule. And afterwards they made the following

RULE OF COURT.

Trinity Term, 42d Geo. 3. 1802.

IT IS ORDERED, That in future where a rule to shew cause is obtained in this Court for the purpose of setting aside an annuity or annuities, the several objections thereto intended to be insisted upon by the counsel at the time of making such rule absolute shall be stated in the said rule *nisi*.

Barnard v. Gostling and Another.

2 East, 569. July 5, 1802.

The stat. 37 G. 3. c. 90, s. 26, requiring a proctor to take out a certificate for practising, under a certain penalty, gives no action to a common informer for the recovery of it; the 6th sect. of that act incorporating the power of suing, &c. given by former statutes only referring to penalties in respect of duties created by prior sections of that act.

It seems, that two proctors may be sued together for not obtaining and entering their certificates, and that one may be acquitted and the other convicted.

IN debt for certain penalties, the third count charged, that the defendants not regarding the statutes in such case made, &c. on, &c. at, &c. did *in their own names as proctors* of the Prerogative Court, &c. and for and in expectation of gain, fee, and reward in the said Court, &c. extract the probate of a certain will and codicil of one J. K. deceased, without having *obtained and entered* any such certificate or certificates, as in and by the statutes in such case made is directed, contrary to the form of the statutes, &c. whereby and by force of the statutes, &c. *the defendants* then and there forfeited *for their said last-mentioned offence* 50*l.*, &c. and an action hath accrued to the plaintiff, &c. A verdict was taken for the plaintiff on this, and on the 12th and 15th counts, which were in a similar form, for other acts done by the defendants as proctors.

The cause was tried at *Guildhall* before *Le Blanc, J.* at the sittings in *Hilary* term last, when a verdict was given for the plaintiff on the 3d, 12th, and 15th counts.

A motion was made on a former day in arrest of judgment, and a rule *nisi* granted on these objections; 1. That the not having obtained *and* entered a certificate are two distinct offences under the stats. 25 Geo. 3. c. 80, and 37 Geo. 3. c. 90. s. 27, and not chargeable as one. 2. That the offence, if entire, is several in its nature, and the defendants cannot be sued *jointly* for the penalty. 3. That the stat. 37 Geo. 3. c. 90. s. 30, creating the penalty, gives no such action as the present to a common informer; but the penalty can only be recovered by information on the part of the Crown.

Erskine, Gibbs, and Espinasse, shewed cause against the rule. As to the first objection, it is answered by the words of the act; the offence charged is not for not *having*, nor for not *entering* the certificate when obtained, but for *acting as proctors*, on the occasion specified, without having done those two things required by the statute. To the 2d, the same kind of answer applies; the defendants acted *jointly as proctors*, and therefore the act of one in that character was the act of both, *Partridge v. Naylor*, Cro. Eliz. 480, unless one

objected, and then it would have been matter of defence to him, and he might have been acquitted by the verdict, though the other were found guilty. *Hardyman v. Whitaker et al.* (a), and *Bastard v. Hancock* and others, Carth. 361. So two may be convicted in one penalty, though not severally, for the same act of using a greyhound to kill game, *R. v. Bleadesdale*, 4 Term Rep. 809. In *R. v. Clarke*, Cowp. 610—12, Lord Mansfield said "Where the offence is in its nature several, and every person concerned may be separately guilty, there each offender is separately liable to the penalty." In that case three persons were convicted under one information for obstructing a custom-house officer, and each was holden separately liable to the penalty. It is true, the statutes creating offences with respect to killing of game have the words *person* or *persons*; but the determinations have not gone on that ground. 3. All the statutes in *pari materia* are to be construed together; and the stats. 39 & 40 Geo. 3. c. 72, and 42 Geo. 3. c. . recite the stats. 25 Geo. 3. c. 80, and 37 Geo. 3. c. 90. and suppose that the same remedies are given for the recovery of the penalties created by each; and certainly an action might be maintained by a common informer for penalties under the 25 Geo. 3. c. 80.

Garrow and Dampier in support of the rule. 1. The same person may be guilty of an offence, both for acting as a proctor without having obtained a certificate, and also for so acting without having entered it. One of these defendants may not have taken out, and the other may not have entered his certificate: but here the plaintiff has joined the two offences which are separate. If this action were brought against one only, the informer could not entitle himself to recover merely on proof of the party having acted as a proctor, without having done only one or the other of those things. The allegation also is, that the defendants did the act without having obtained and entered any such certificate or certificates: which leaves it uncertain for what offence, or whether against one or both the defendants, the plaintiff intends to proceed. 2. The action is in its nature several, and cannot be maintained against the two defendants jointly. It is not like the cases on the game laws, where two may concur in the same act: for here the omission to obtain his certificate by one cannot be the omission of the other. The existence of a partnership could not alter the case; for each partner is individually bound to take out his certificate, and the taking it out by one alone would not protect the other: neither then can the omission to do so be made a joint act. But under the game laws, if one be qualified, that will protect the others acting in aid of him. 3. The stat. 37 Geo. 3. c. 90. (upon which this action must be sustained) s. 1. & 2. says nothing about the certificates: s. 6. which applies the powers of suing, &c. for penalties contained in any prior acts then in force to that act, is confined to such duties as are therein before mentioned; and no mention is made of attornies' certificates till the 26th section. The former clause, therefore, does not apply to this latter, so as to give this action to the common informer. Then the general words of reference to the remedies given by prior statutes, contained in the subsequent statutes, which it is not pretended do themselves give the action, cannot supply the omission.

Curia advisare vult.

The Court, on this day, made the rule absolute, on the ground that the stat. 37 Geo. 3. c. 90, gave no such action as the present to the common informer; the section incorporating the power of suing, &c. only applying to the sections antecedent to that, and not to the subsequent section which gave this penalty.

This opinion ruled another case of *Edmonson v. Plaistow*, which came on upon a motion in arrest of judgment.

LAWRENCE, J. (who delivered the judgment) added, that if it were necessary to decide the other point, as to whether the defendants could be charged

(a) Bull. Ni. Pri. 189, therein cited as *Hardman v. Whitaker & al.* Vide post, 573 note.

jointly for the recovery of the penalties, it was governed by the case of *Hardyman v. Whitaker*, of which he had a MS. note, to which he referred (a).

Rule absolute.

(a) *HARDYMAN and WHITAKER et al.*

(Mich. 22 Geo. 2. Bull. N. P. 189. S. C.)

By the stat. 12 Ann. c. 14. s. 4, it is enacted, that if any person not qualified by the laws of the realm so to do shall keep or use any greyhounds, setting-dogs, hayes, lurchers, tunnells, or any other engine to kill and destroy the game, and shall be thereof convicted by a justice of the peace, &c. the person or persons so convicted shall forfeit the sum of 5*l.* one half to the informer and the other half to the poor of the parish, to be levied by distress and sale, &c. And by the stat. of 8 Geo. 1. c. 19, it is enacted, that wherever any person shall for any offence to be hereafter committed against any law now in being for better preservation of the game be liable to pay any pecuniary penalty upon conviction before any justice of peace, it shall be lawful for any other person whatsoever, either to proceed to recover the said penalty by information and conviction before a justice of peace, or to sue for the same by action of debt or on the case, bill, plaint, or information, in any of his Majesty's courts of record, wherein the plaintiff, if he recover, shall have double costs: provided that all suits and actions to be brought by force of this act shall be brought before the end of the next term after the offences committed: but no person to be doubly prosecuted for the same offence.

By virtue of these statutes a joint action of debt was brought against the defendants *Whitaker* and eight others to recover one penalty of 5*l.* as forfeited by the said stat. 5 Ann. The memorandum on the record being of *Trinity* term; and the declaration charging that before the exhibiting the bill, viz. on 27th *January*, the defendants kept a lurcher to kill and destroy the game.

The defendants pleaded *nil debent*. The jury found as to six of the defendants that they do owe to the plaintiff 5*l.* and as to the other three that they owed nothing. Upon this there was a motion in arrest of judgment, and three objections made.

1. That it appears by the memorandum of the record, that this suit was commenced in *Trinity* term, and the declaration states the offence to have been committed on the 27th of *January* preceding; so that the action appears upon the record itself to have been commenced after the time limited by the act of parliament.

2. That this being an action of debt is a joint action against all the defendants; and the jury having discharged three of them, their verdict has destroyed the plaintiff's action.

3. That a joint action as this is cannot for this matter be maintained against several. 2 Roll. Abr. 81. pl. 6. *Brooke's case*: if four persons are indicted that they *et eorum ulerque* used the trade of a plumber contra stat. 5 Eliz. it is not good; for that the user of one cannot be the user of another. S. P. East. 11 Geo. 1. *The King v. Weston*; indictment against two, charging them jointly for exercising a trade, is bad.

But the Court, after argument and consideration, over-ruled all the objections.

As to the first objection; though it do not appear that the bill was filed before of *Trinity* term, yet *non constat* but there was a prior commencement of the action by suing out a *latitat*; which is said to be the truth of the case; and the suing out a *latitat* is a sufficient commencement of the suit to save the limitation of time, in an action for a penalty forfeited, by the statute; as was resolved by three judges in the case of *Culiford v. Blandford*, Carth. 252.; and therefore, this is not to be compared to the cases where the exhibiting the bill appears to be the commencement of the action, and the cause of action arises subsequent to the memorandum.

As to the 2d objection, this action is not to be considered as founded on a contract, but on a tort, which is joint and several; and for this the case of *Baslard v. Hancock*, Card. 361, is in point: where in an action of debt on the statute against several defendants for not settling out tithes, the jury found for the plaintiff against one defendant only; and as to the others *nil debent*: and this very objection taken in arrest of judgment, but over-ruled; for that the action being founded on a tort, and not on a contract, *non culpabilis* would have been a good plea; and therefore one of the defendants may be found guilty and the others acquitted, as in other actions upon torts.

As to the 3d objection: there is no doubt but that the law allows the charging several persons as joint offenders: and in this case the statute itself has considered several as capable of being joint offenders; for it says, that if any person or persons shall keep lurchers and be thereof convicted, the person or persons so convicted shall forfeit 5*l.* So that it gives one penalty of 5*l.* to be paid by the person or persons who act against the statute. The statute has therefore made it a joint offence in all persons concerned, and has made them all subject but to one forfeiture, and they are consequently within the rule of the common law punishable jointly. And therefore the case in Roll. Abr. and the case of *The King v. Weston* will not govern the present; for the penalty in the stat. 5 Eliz. is laid upon every person offending: and therefore in the case of *The Queen v. Atkinson*, 2 Ld. Raym. 1248, and Salk. 382, upon an

Stevenson v. Lambard.

2 East, 575. July 6, 1802.

An action of covenant lies against the assignee of a lessee of an estate for a part of the rent, as in such case the action is brought on a real contract in respect of the land, and not on a personal contract. And in case of eviction the rent may be apportioned, as in debt or replevin. *Aliter* in covenant against the lessee himself who is liable on his *personal* contract.

THE plaintiff declared in covenant against the defendant as assignee of one *Charles Dixon* upon an indenture made on the 1st of *May* 1798, whereby the plaintiff, for the considerations therein mentioned, demised to *Dixon* and his assigns two messuages and a warehouse therein described, to hold from the 25th of *March* then last past for the term of 31 years at the yearly rent of 105*l.* by equal quarterly payments, viz. &c. The declaration then set forth the covenant by *Dixon* for himself and his assigns, &c. to pay to the plaintiff the said yearly rent at the times and in the manner above mentioned; and that *Dixon* entered and was possessed; &c. and that afterwards, on the 28th *March* 1801, all the right, title, &c. and term of years then to come and unexpired in the said demised premises, vested by assignment in the defendant, who by virtue thereof entered, and became and was possessed for the residue of the said demised term then unexpired. And then assigned a breach for non-payment of one year's rent, which became due on the 20th *September* 1801, since the said assignment. Pleas, 1. *Non est factum*; 2. that all the interest and title, &c. of *Dixon* did not vest by assignment in the defendant; 3. No rent in arrear: on all which issues were joined. The defendant then pleaded, 4thly, That as to so much of the said supposed breach of covenant above assigned, as relates to the non-payment of the sum of 52*l.* 10*s.*, parcel of the said 105*l.* of the rent supposed to become due on the 29th *September* 1801, for one half year of the said term, *actio non*, &c. because one *John Walker*, before and at the time of making the said indenture, &c. and from thence until upon and after the said 29th *September* 1801, was seized in fee of one undivided moiety of the said demised premises, and brought an ejectment in K. B. in Hill. 41 Geo. 3, against the present plaintiff for the recovery of the same, in which ejectment the demise was laid before any the said 52*l.* 10*s.*, parcel of the rent aforesaid, became due, &c. and such proceedings were afterwards had, &c. that *Walker* in *Easter* term, 41 Geo. 3, recovered judgment against the

objection of this kind taken to an indictment against two persons for extorting money as receivers of the land-tax *colore officii*, and supported by the above case in Roll. Abr., it was resolved to be an offence which two might join in, or it might be several, as in trespass; but otherwise of exercising a trade; for per *Holl*, the forfeitures are distinct, and that which makes the crime is several, viz. the not having been apprentice. But that is not the case at present where the statute itself has made the offence joint: and the distinction is where the offences are made joint and where not; as in the case of *Partridge v. Naylor*, Moore, 453, in an action of debt on the stat. 1 & 2 Phil. and Mar. for impounding a distress in divers pounds brought against three, who being found guilty, damages of 40*s.* a-piece were assessed and trebled by the Court to 6*l.* a-piece, and 5*l.* a-piece forfeiture by the statute: and though the words of that statute are, that every person offending shall forfeit to the party grieved 5*l.* and treble damages; yet upon error, the Court, after several arguments, reversed the first judgment: for that the words "every person offending" are not to be referred to the severality of the persons, but of the offences; and as they all three offended in one joint act, there ought to have been but one 5*l.* forfeited. And in the case of the *Queen v. King*, Salk. 182, where two were convicted of deer-stealing, and judgment that each should forfeit 80*l.* And because this penalty is not in nature of a satisfaction to the party grieved, but a punishment on the offender, and crimes are several, though debts be joint, and therefore distinguished it from the case of *Partridge v. Naylor*. For which reason the Court gave

Judgment for the Plaintiff.

present plaintiff in the said ejectment, for the said undivided moiety of the demised premises, and afterwards, *viz.* on 21st of *April* 1801, sued out a writ of *habere facias possessionem* upon the said judgment, under which the sheriff, before any part of the said 52l. 10s. parcel, &c. became due, delivered possession, &c. to *Walker*, who thereupon entered into the said undivided moiety, &c. and ejected the defendant, &c. There was a similar plea, stating generally the paramount title of *Walker*, and his ejection of the defendant from one moiety of the demised premises. To these there was a general demurrer and joinder.

Marryat, in support of the demurrer, said, that as it was clear that an action of *debt* would lie in this case, and as the authorities established generally (though, he admitted, without distinguishing between *debt* and *covenant*.) that in case of an eviction of the tenant from part of the lands leased, the rent was apportionable, it lay on the defendant to point out the distinction between debt and covenant in this case. And he cited Bro. Abr. tit. Apportionment, pl. 24, and 1 Rol. Abr. 235. pl. 16, Gilb. on Rents, 147, *Clun's* case, 10 Co. 128, a., and *Midgley v. Lovelace*, Carth. 289, and contended that a breach might be assigned in covenant merely on the *reddendum*. That supposing a contract not to be apportionable, yet there was no inconsistency in the plaintiff in this case; for he did not declare in covenant as for a moiety of the rent reserved, but for the whole; and it was not competent for the defendant to set up as a bar to the whole demand that which was only an answer to part of it.

Lawes, contra, relied on the want of any precedent of a recovery in covenant under similar circumstances, as a strong argument for shewing that the action was not maintainable. There is a material distinction between debt and covenant in this respect; for in the former, the law raises a debt in respect of the privity of estate, and therefore the amount is necessarily apportionable in respect of the quantum of estate. But the latter is a personal contract, and cannot be apportioned. He referred to 3 Vin. Abr. 5, as collecting all the cases. At any rate, tho plea is an answer to the breach assigned, which is for the non-payment of the *whole* rent, now admitted not to be due. In *Richards v. Comeford*, Com. Rep. 42, where the defendant avowed for two years and a half rent in arrear on a lease, reserving the rent yearly, the Court of B. R. on error brought, held, that though before judgment the avowant might have abated his avowry as to that part to which he had no right, yet on the whole record, as it then stood, judgment must be reversed, because the avowry was for the whole rent, and he could not support his title to the whole. Here there can be no apportionment on the demurrer, (Hil. 43 Eliz. B. R. 17, Vin. tit. Apportionment, E.) for apportionment is the act of a jury; and therefore, as the Court must pronounce judgment for the plaintiff, if at all, to the extent of the breach assigned, and it appears that so much is not due, there must be judgment for the defendant.

Marryat, in reply, observed, that no case had been stated to shew the distinction contended for. That in the case of *Richards v. Comeford*, there was no eviction of the tenant from any part of the land, but an attempt to apportion the rent as to part of the *time* before it was due, which all the books agree (a) cannot be done. That as to the breach being assigned for the non-payment of the whole rent, instead of a proportion of it; if the plaintiff might have recovered on this declaration for what was due, provided the defendant had pleaded his defence *pro tanto*, according to the truth; it could not vary the plaintiff's right that the defendant had pleaded the same defence in bar to the whole right of action, which he ought not to have done.

Curia advisare vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court:

(a) Vide 10 Co. 128. a.

This is an action of covenant by the lessor against the assignee of the lessee for non payment of a year's rent. Plea, as to rent for half a year claimed, eviction during that time of a moiety of the premises by title paramount. To this there is a demurrer: and the question is, Whether the rent be apportionable in this action of covenant by the lessor against the assignee of the lessee? It clearly is so in an action of debt or upon an avowry in replevin, by all the authorities: and the only question is, Whether it be so in covenant? In covenant as between lessor and lessee, where the action is personal, and upon a mere privity of contract, and on that account transitory as any other personal contract is, the rent is not apportionable. Bro. Contract, pl. 16. Moor 116, Finch's Law, lib. 2. c. 18. But an action of covenant against an assignee differs essentially from a mere covenant personal: it is in such case properly a real contract in respect of the land; it is local in its nature and not transitory. In *Barker v. Damer*, Carth. 183, it is said to be "adjudged in several of our books^(a) that an action of debt for rent against an assignee of a term is local, and will lie no where but in that county where the lands are. And the same reason holds in covenant against the assignee: for this action as well as that of debt is maintainable only upon the privity of estate, and the defendant is merely charged thereby, because it is a covenant which runs with the land; for if it had been a collateral covenant, the assignee would not have been bound by it; and that proves that the action is local only with respect to the land." The objection as to the locality of this species of action of covenant, as against an assignee, was only gotten over in the case of the Mayor of London against *Cole*, 7 Term Rep. 587, by help of the stat. 16 & 17 Car. 2. c. 8, as being a mis-trial cured by verdict. So covenant will lie against the assignee of part of an estate for not repairing his part; "for it is dividable, and follows the land," with which the defendant as assignee is chargeable by the common law, or by the stat. 32 H. 8. c. 37. *Congham v. King*, Cro. Car. 222. Upon the whole, therefore, we think that the condition of this assignee is in point of law different from that of a lessee chargeable on the privity of contract; and being chargeable on the privity of estate, and in respect of the land, his rent is upon principle apportionable as the rent of a lessee is, or as his rent would be in an action of debt or replevin.

Judgment for the plaintiff; with leave to the defendant to amend his plea, and to plead it only to one moiety of the rent.

Johnson v. Sheddon.

2 East, 581. July 7, 1802.

The rule by which to calculate a partial loss on a policy on goods by reason of sea-damage is the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds: It being settled that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination.

THIS case was very fully argued in Easter term, 41 Geo. 3, by *Garrow*, *Parke*, and *Laves*, against the rule for a new trial, and by *The Attorney General* and *Gibbs* in support of it. It is unnecessary to detail the arguments, as the substance of them was so distinctly stated in the judgment of the Court, which was delayed till now in consequence of a difference of opinion on the Bench while Lord *Kenyon* presided in the Court.

(a) Vide all the cases collected by Serjt. *Williams* in a note to the case of *Thursby v. Plant*, 1 Saund. 241. b.

LAWRENCE, J. (in the absence of *Grose*, J.) now delivered the judgment of the Court :

This is a motion for a new trial of an action brought against the defendant, an underwriter on goods on board a ship called the *Carolina*, from *Sicily* to *Hamburgh*, to recover a partial loss sustained by the plaintiff, by reason of the sea water having damaged a cargo of brimstone and shumack ; and upon a calculation by Mr. *Oliphant*, to whom it was referred by the parties to ascertain the loss sustained, it has been settled after the rate of 76*l.* 7*s.* 4*d.* *per cent.* And the ground on which the new trial has been moved for is, that Mr. *Oliphant* has proceeded in his calculation upon a mistake, inasmuch as in estimating the loss he has taken for his foundation the difference between the *net* produce of what the goods have produced, and what they would have produced, if sound ; instead of the difference between their respective *gross* produces. Upon the fullest consideration that we have been able to give this question, (which has been depending a great while, and which was argued before Lord *Ellenborough* came upon the Bench, and who, if the case were to be argued again, would give no opinion, having been concerned in the cause when at the bar,) my brothers *Grose* and *Le Blanc* agree with me in thinking there should be a new trial, and that the calculation is wrong. Some points are agreed on both sides ; viz. that the loss is to be estimated by the rule laid down in *Lewis v. Rucker*, 2 Burr. 1170, that the underwriter is not to be subjected to the fluctuation of the market : that the loss for which the underwriter is responsible is that which arises from the deterioration of the commodity by sea damage ; and that he is not liable for any loss, which may be the consequence of the duties, or charges to be paid after the arrival of the commodity at the place of its destination. In *Lewis v. Rucker*, Lord *Mansfield* says, "Where an entire individual, as one hogshhead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantum of the damage : but "if you can fix whether it be a 3*d.*, a 4*th.*, or a 5*th.* worse, the damage is fixed "to a mathematical certainty ;" and this he says is to be done by the price at "the port of delivery." From hence it follows, that whatever price at the port of delivery ascertains whether a commodity be a 3*d.*, 4*th.*, or a 5*th.* the worse, is a price to which he alludes. And this deterioration will be universally ascertained by the price given by the consumer or the purchaser, after all charges have been paid by the person of whom he purchases ; or in other words, by the difference of the gross produce, and not by the difference of the net produce. When a commodity is offered to sale as by one who has nothing further to pay than the sum the seller is to receive, it is the quality of the goods, which in forming a fair and rational judgment can alone influence him in determining him what he shall pay : he has nothing to do with what it may have cost the seller ; and the goodness of the thing is the criterion which must regulate the price : for being liable to no other charges, he has only to consider its intrinsic value : and therefore, if a sound commodity will go as far again as a damaged commodity, by having twice its strength, or by being in any other respect twice as useful, he will give twice the money for the sound that he will for the damaged, and so in proportion. To say that this is not the rule will be to assert, what I conceive it will be difficult to prove, that the market price of things is not proportioned to their respective values : and if it be, it is a means of ascertaining whether a commodity be a 3*d.*, a 4*th.*, or a 5*th.* the worse by any risk it may have met with, and the damage will be thereby ascertained in the degree pointed out in *Lewis v. Rucker* ; and the underwriter who shall pay by this rule, will pay such proportion or aliquot part of the value in the policy, as corresponds with the diminution in value occasioned by the damage. Lord *Mansfield* in laying down the rule speaks of the *price* of the thing at the port of delivering as the means of ascertaining the damage ; by which he must mean the *whole* sum, which is to be paid for the thing. For the net proceeds

are not the price, but so much of the price as remains after the deduction of certain charges. Lord *Mansfield* cannot mean the price before the mast, leaving the purchaser liable to the payment of further sums; for such payment is in effect but *a part* of the price; it is not an equivalent for the thing sold: for if the purchaser were not liable to the duties and charges, he would give as much more as the amount of those charges comes to. The price of a thing is what it costs a man; and if, in addition to a sum to be paid before the mast, other charges are to be borne, that sum and the charges constitute the cost. It is not necessary that the whole price should be paid to one person. To taking the net proceeds to calculate by, there are several objections: one is, that by taking the net proceeds as the basis of the calculation instead of the gross proceeds, it will happen, where equal charges are to be paid on the sound and damaged commodity, that the underwriter will be affected by the fluctuation of the market, which he ought not to be. This is obvious from considering, that if you take equal quantities from two unequal quantities, the smaller such unequal quantities are, the greater will be the difference between the remainders: e. g. Suppose sound goods, including all charges, to sell for 600*l.*, damaged for 300*l.*; let the charges on each be 100*l.*: the difference after they are deducted, will be 300*l.* or 3-5ths. But let the goods come to a fallen market with the same degree of deterioration, and let the sound sell for 300*l.* and the damaged for 150*l.*, and deduct from each the charges, the net proceeds of the sound will be 200*l.*, and of the damaged 50*l.*; and the difference will be 3-4ths. But as the deterioration is the same in both cases, the underwriter should pay the same, whatever be the state of the market; which he will do if the gross produce be taken *scil.* half the valued or invoice price. Another consequence of taking the net produce will be, that you will make the underwriter responsible for a loss not arising from the deterioration of the commodity by sea damage; but for that loss which the assured suffers from being liable to pay the same charges on the sound and damaged commodity. This will be illustrated by the case put of two ships arriving with the same commodity equally damaged; one being subject to duties and charges, and the other to none: the degree of deterioration being supposed the same, the underwriters should pay alike in both cases. Suppose then the cargoes to be deteriorated half; that the demand for the commodity and the state of the market is the same; and that the goods, if sound, would sell for 1000*l.*, but being damaged, for 500*l.*, and the charges to be 200*l.*. On those goods where no charges are to be paid, the insurer will have to pay 50 per cent. The goods on which charges are to be paid, being equally good with the other, will sell in the market for the same sum, and when the charges are deducted, if sound will produce 800*l.*: but being damaged, after the same deduction, will produce only 300*l.*: and according to that calculation, if the underwriter were to pay, he would pay 5-8ths instead of 4-8ths, or one half; not because the one cargo has suffered more than the other by the sea, for the supposition is, that the sea damage is the same in both; but from commodities of unequal value being subjected to equal duties and charges. Suppose the same goods sold before the mast; a purchaser for those not liable to the duties, would give exactly what he would give if there had been duties which the seller had paid; for as he has nothing further to pay to him, it is just the same, whether the seller had no charges to pay, or whether there were charges which he has paid; the commodity in the one case and in the other comes to the buyer's hands in the same state. But on these goods, if liable to the further charges, he could give, if sound, but 800*l.*, as the duties he would have to pay would make the whole cost 1000*l.* and if damaged, and liable to the same charges, he could give but 300*l.*: for as he would be liable to pay 200*l.* in charges, if he were to give above 300*l.* the whole amount of what he would ultimately pay for the damaged goods would exceed their value, which by the supposition is but 500*l.* he would therefore

in this case give for the damaged less than in proportion to its degree of deterioration ; for in giving 300*l.* he would only give 3-8ths instead of 4-8ths, or a half ; not because the damaged commodity is not half so good as the sound, but because on such damaged commodity he must pay as large charges as on the sound ; and as this loss to the assured arises from a purchaser not being able to pay in proportion to the intrinsic quality of the commodity, it shews that a sale before the mast, when equal duties are to be paid, does not correspond with the deterioration of the commodity, nor ascertain whether it be a 3d, 4th, 5th, or in what degree worse than the sound : consequently, that the difference of the net produce cannot be the rule to calculate by, where the charges are not proportioned to the respective values of the sound and damaged commodity. Another objection is, that if the net produce be taken, it may happen that you can have no data to calculate by, which will be the case if the gross produce of the sound commodity should only pay the charges ; and leave no net proceeds ; for then there can be no difference between the net proceeds of the sound and damaged ; in proportion to which it is contended that the underwriter is to pay. Upon the whole of this case it is our opinion that the rule should be absolute for a new trial(1).

Rule absolute(2).

(1) The same point was determined in the Common Pleas, in the *Michaelmas* term following. *Hurry & al. v. The Royal Exchange Assurance Company*, 3 *Ben. & Pul.* 308. As to the rule for estimating a loss of goods insured by an open policy, see *Usher v. Noble*, 12 *East* 639.

(2) [See the remark on this case in *Stevens and Benicke on Average* (Phillips Ed.) p. 243, &c. Also p. 342, &c. and Mr. Phillips' note on p. 360. See also 2 *Phillips on Insurance*, 2d ed. from p. 214 to p. 226.—W.]



AN
INDEX
TO THE
PRINCIPAL MATTERS.

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ABATEMENT.

See PLEADINGS, No. 5. 7.
PRACTICE, No. 14.

ACCEPTANCE OF GOODS.

See ASSUMPSIT, No. 4.

ACTION ON THE CASE.

See AGREEMENT. ASSUMPSIT, No. 7.
PLEADINGS, No. 8, 9, 20, 21, 22.

- 1 The defendant having had a credit lodged with him by a foreign house in favour of one *W. T.* to a certain amount, upon an express stipulation that *W. T.* should previously lodge in his hands goods to treble the amount; and being applied to by the plaintiffs for information respecting the responsibility of *W. T.* answered that he knew nothing of *W. T.* himself, but what he had learned from his correspondent; but that he had a credit lodged with him for so much by a respectable house at *H.* which he held at *W. T.*'s disposal, (omitting the condition,) and that upon a view of all the circumstances which had come to his (the defendant's) knowledge, the plaintiffs might execute *W. T.*'s order with safety; viz. an order for the sale and delivery of goods on credit. In an action on the case to recover damages incurred by the plaintiffs in consequence of having trusted *W. T.* on this representation; held, that there was a material suppression of the truth, and evidence sufficient for the jury to find fraud, which is the gist of the action; although the defendant had no immediate interest in making the false representation; and though at the time when it was made, he added, that he gave the advice without prejudice to himself. *Eyre v. Dunsford*, Hil. 41 Geo. 3. 161
- 2 An action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff; at least not without proof of malice. *Harman v. Tappenden*, Trin. 41 G. 3. 271
- 3 In an action against a returning officer for refusing a vote at an election of members to serve in parliament, malice must be proved as well as laid. *Semble*, that charging that the defendant knowing, &c. and wrongfully intending to deprive plaintiff, &c. hindering him from giving his vote, &c. is a sufficient allegation of malice. *Drew v. Coulton*, Launceston Sp. assizes, 1787, cor. *Wilson J.* 279
- 4 Where a mob attacked a baker's house and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves below the marketable value; held, this was evidence for the jury of a felonious beginning to demolish the house, &c. within the 4th section of the riot act; and that the plaintiff might recover for the damage done to the house, in an action against the hundred on the 6th section, but not for the value of the flour so sold, that not being consequential to the act of demolition: nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house on the opposite side of the street, of which the lock only was burst: that not being a beginning to demolish, &c. within the act, with the view with which it appeared to be done. *Burrows v. Wright*, Trin. 41 Geo. 3. 298
- 5 Where a mob after beginning to demolish and pull down a house, steal flour therein, or force the owner to sell at an under price, the value thereof cannot be recovered in an action against the hundred on the 6th section of the riot act, 1 Geo. 1. st. 2. c. 5, such stealing and robbery being substantive felonies, and not within the offence created by the 4th section of the act. But flour which was spoiled or destroyed at the time of such beginning to demolish, &c. may be so recovered. *Greasley v. Higginbotham*, Trin. 41 Geo. 3. 308
- 6 To an inquiry concerning the credit of another, who was recommended to deal with the plaintiff, a representation by the defen-

dant that the party might safely be credited, and that he spoke this from *his own knowledge*, and not from hearsay, will not sustain an action on the case, for damages on account of a loss sustained by the default of the party, who turned out to be a person of no credit; if it appear that it was made by the defendant bona fide, and with a belief of the truth of it; for the foundation of the action is *fraud and deceit* in the defendant, and damage to the plaintiff by means thereof. And taking the assertion of *knowledge secundum subjectam materiam*, viz. the credit of another, it meant no other than a strong belief, founded on what appeared to the defendant to be reasonable and certain grounds. *Haycraft v. Creasy*, M. 42 G. 3. 376

- 7 A commoner may maintain an action on the case for an injury done to the common by taking away from thence the manure which was dropped on it by the cattle; though his proportion of the damage be found only to amount to a farthing; at least the smallness of the damage found is no ground for a nonsuit. *Pindar v. Wadsworth*, H. 42 G. 3. 405
- 8 In estimating the measure of damages in an action for breach of an engagement to replace stock on a given day, it is not enough to take the value of the stock on that day if it have risen in the mean time, but the highest value as it stood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time while the market was rising. *Shepherd v. Johnson*, H. 42 G. 3. 430
- 9 In an action on the case in tort for a breach of a warranty of goods, the *scienter* need not be charged, nor, if charged, need it be proved. *Williamson v. Allison*, T. 42 G. 3. 446
- 10 It is not necessary to give a local description to the nuisance in an action on the case for diverting the water of a navigation; and therefore if it be doubtful whether the place where such navigation is stated to lie be laid in the declaration as a venue or as local description, it will be referred merely to venue, and need not be proved to be at such place; but it is sufficient if it be at any other place within the county. *The Mersey and Irwell Navigation v. Douglas*, T. 42 G. 3. 560

ADDITION.

- 1 The plaintiff, in an affidavit to hold the defendant to bail, must give himself an addition; otherwise the defendant will be discharged on common bail. *Jurrett v. Dillon*, Mich. 41 Geo. 3. 26
- 2 The affidavit to hold to bail is part of the process to bring the defendant into court; an irregularity must be taken advantage of in the first instance, and is waived by the defendant's putting in bail. Such affidavit ought to give the addition as well as

place of abode of the party making it. *Dargent v. Vivant*, otherwise *Taylor*, Hil. 41 Geo. 3. 167

ADMIRALTY.

- 1 An appointment by the Lords of the Admiralty of a captain in the navy to be second commander on board a King's ship is valid by their general authority to appoint what officers they think proper for the service, although another was appointed to the first command on board the same ship, and notice is only taken of one captain in the book of regulations for the navy. And such second captain is entitled to a captain's share of prize under the king's proclamation. *Waterhouse v. King*, T. 42 G. 3. 565
- 2 The book of regulations for the navy, submitted by the Lords Commissioners of the Admiralty to the King in council in 1730, and approved by his Majesty by an order of council, is only directory to the Lords Commissioners. *ib.*

AFFIDAVIT.

Where a defendant is brought up to receive judgment after conviction, an affidavit by the prosecutor in aggravation, stating that a third person, who refused to join in the affidavit, had informed him that the defendant after the trial had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least not without stating, that such third person was under the control or influence of the defendant. *R. v. Pinkerton*, E. 42 G. 3. 497

AFFIDAVIT to hold to Bail.

- 1 In an affidavit to hold to bail for 1190l. 11s. 3d. it is not enough to negative a tender of the said debt in bank notes; for non constat but a tender in bank notes was made of all but the fractional sum, which would be sufficient within the statute, 37 Geo. 3. c. 45. *Jennings v. Mitchell*, Mich. 41 Geo. 3. 25
- 2 The plaintiff, in an affidavit to hold the defendant to bail, must give himself an addition, otherwise the defendant will be discharged on common bail. *Jarrett v. Dillon*, Mich. 41 Geo. 3. 26
- 3 No objection can be made to the insufficiency of an affidavit to hold to bail, in not negating a tender of the debt in bank notes, after the bail have justified. *Jones v. Price*, Mich. 41 Geo. 3. 55
- 4 An affidavit to hold to bail, sworn by a clerk in the chamberlain of London's office as to the existence of the debt, and that no tender of it had been made in bank notes to the best of his knowledge and belief, held sufficient in an action brought by the corporation. *The Mayor, &c. of London, v. Dias*, Hil. 41 Geo. 3. 125
- 5 The affidavit to hold to bail is part of the process to bring the defendant into court;

- any irregularity in it must be taken advantage of in the first instance, and is waived by the defendant's putting in bail. Such affidavit ought to give the addition as well as place of abode of the party making it. *Dargent v. Vivant* otherwise *Taylor*, Hil. 41 Geo. 3. 167
- 6 An affidavit to hold to bail made by the agent of the plaintiff, expressly negating a tender in bank notes of the debt to his principal, as well as to himself, is sufficient, though the plaintiff himself were not therein stated to reside abroad. *Knight v. Keyte*, East. 41 Geo. 3. 206
- 7 In an affidavit to hold to bail for 20*l.* and upwards, it is sufficient to negative a tender of the said sum in bank notes; that having reference to the specific sum sworn to, which was such as might be so tendered. *Maylin v. Townsend*, M. 42. G. 3. 335
- 8 Where the principal resides here, it is not sufficient for his agent in an affidavit to hold to bail to negative a tender of the debt in bank notes to the best of his knowledge and belief; but such tender must be positively negated. *Elliott v. Duggan*, M. 42 G. 3. 345
- 9 An affidavit to hold to bail for a certain sum for the breach of an agreement must shew that the sum is stipulated damages, and not merely a penalty. Stating that the defendant bound himself in a certain sum to perform a certain agreement, and that he had neglected and refused to perform his part, is not sufficient. *Witley Thornton*, T. 42 G. 3. 520
- 10 No counter affidavit can be received in *B. R.* in order to contradict or do away the effect of an affidavit to hold to bail on the merits. And though such counter affidavit might be received to shew that the defendant had been before holden to bail for the same cause of action here, yet it will not avail to shew that he was before so holden to bail in a foreign country; at least where it did not distinctly appear that the defendant could have the same redress and benefit by the proceedings abroad as here. *Imlay v. Ellefsen*, T. 42 G. 3. 540
- 11 If a defendant be holden to bail under a Judge's order, upon an affidavit disclosing circumstances which shew that the plaintiff has been *damified* to such an amount, it is sufficient: though it improperly state that the defendant was *indebted* to that amount, and disclose the special circumstances *ib.*
- the vendee's approbation, it was taken away,) is sufficient to warrant the jury in finding a delivery and acceptance by the vendee: thereby taking the case out of the statute of frauds. *Chaplin v. Rogers*, Hil. 41 Geo. 3. 105
- 2 In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt and to pay for it according to the terms of the sale, but that the defendant refused to deliver it; without averring an actual tender of the price. *Rawson v. Johnson*, Hil. 41 Geo. 3. 110
- 3 In *assumpsit* for goods sold and delivered, defendant pleaded a set off of more money due to him from the plaintiff. Replication, that the goods were agreed to be paid for in ready money, which replication was holden bad on demurrer, being no answer to the plea. *Eland v. Karr*, East. 41 G. 3. 183

AMENDMENT.

See PRACTICE, No. 7.

Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed. *Coutanche v. Le Ruez*, Hil. 41 Geo. 3. 79

ANNUITY.

- 1 A memorial under the annuity act of a bond stating that *A.* and *B.* severally became bound is not sufficient in law if the bond be joint, as well as several. *Witley v. Cawthorne*, East. 41 Geo. 3. 199
- 2 Where a former rule for setting aside an annuity was discharged, because it did not appear that an indorsement [not memorialized] containing a clause of redemption [bearing date after the deed] had been made prior to the execution of it; in which case it could not be received in evidence for want of being stamped; the court will not enter into the question on a subsequent rule; although it appear clearly that the indorsement was made before the deed was executed; and that such clause of redemption was not inserted in the memorial of the annuity enrolled according to the stat. 17 Geo. 2. c. 26. *Schumann v. Weatherhead*, Trin. 41 G. 3. 263
- 3 An annuity granted in 1790, the grantee of which died in 1794, and the interest of which was regularly paid till 1800 without objection, shall not be impeached for a supposed defect of consideration, which might have been explained by the grantee if living. And semble, that an annuity paid without objection for more than six years shall be protected by analogy to the statute of limitations against any such objection de hors the memorial, without strong

AGENT.

See ASSUMPSIT, No. 4.

AGREEMENT.

See ACTION ON THE CASE. ASSUMPSIT. PLEADING.

See STOCK, No. 1.

- 1 After a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person (by whom, though against

- reasons to the contrary. *Ex parte Maxwell*, M. 42 G. 3. 372
- 4 An annuity secured on lands in fee of equal annual value need not be registered under the stat. 17 G. 3. 26. s. 8, though the annuity were also secured upon leasehold property. *Ex parte Michell*, H. 42 G. 3. 387
- 5 A memorial of an annuity, stating the whole consideration to have been paid in money, is good; though part of it were paid by means of a banker's check, the value of which had been actually received by the grantor some time before the execution of the deeds. *ib.*
- 6 Where the memorial of an annuity registered under the statute 7 G. 3. c. 26, stated that "the bond, warrant of attorney, indenture and deed poll, given to secure the annuity, were witnessed by four persons," that must be taken to mean that each of them were so witnessed; and therefore if it appear by the answer on oath of the assignee of the grantee, that three of the instruments were attested by two persons only, the court on application, though at the distance of near twenty years, and after the principal parties and witnesses to the transaction are dead, will set aside the warrant of attorney; the merits of such objection not depending on testimony lost by the delay. *Ex parte Mackreth*, T. 42 G. 3. 590
- 7 Where a rule nisi is obtained in B. R. for setting aside an annuity, the several objections thereto intended to be insisted on by counsel at the time of making such rule absolute must be stated in the said rule nisi. *Regula generalis*, T. 42 G. 3. 598

APPEAL.

- See OVERSEERS OF THE POOR, No. 2.
- By s. 19. of stat. 18 G. 3. c. 78, where an order of justices has been made for stopping up a road an appeal is given to the party grieved by any "such order or proceeding, &c. at the next quarter sessions after such order made or proceeding had, &c." held that at all events an appeal to the sessions next after the actual obstruction of the road was too late: the party having had sufficient notice of the order in time to have appealed to a preceding sessions, before which time the surveyors of the highways had begun to stop up the road. *R. v. The Justices of Pembrokehire*, H. 42 G. 3. 431

APPOINTMENT.

See POWER.

APPRENTICE.

See SETTLEMENT BY APPRENTICESHIP.

ASSUMPSIT.

See BILLS OF EXCHANGE, No. 3, 4, 5. INSURANCE, No. 1.

- 1 A captain of a troop, during the time of his absence, and while another officer is in the actual command of it, by whom the or-

ders for subsistence are issued, and the subsistence money is received from government, is not liable to pay for subsistence furnished to the men, though such captain was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders. *Myrtle v. Beater*, Hil. 41. Geo. 3. 80

- 2 Where money was lent by the plaintiff to the defendant, for which a note was given on a wrong stamp; plaintiff, on parol proof of such consideration, may recover on the money counts. *Tyle v. Jones, Sittings at Westminster 1788*, cor. Lord Kenyon. 44
- 3 An action upon promises lies by a ship owner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern. *Birkeley v. Presgrave*, H. 41 G. 3. 118
- 4 *A.* and *B.* merchants abroad, ship tobacco for *Liverpool*, consigned to *A.* himself there to whose order the bills of lading are made: one of these bills is sent inclosed in a letter from the shippers to *C.* at *Liverpool*, advising him of such consignment to *A.*, and that *A.* intended to proceed to *Liverpool*, but in case he should not arrive in time desiring *C.* to do the best for them. The tobacco, having arrived in a damaged state before *A.*, is required to be landed, and is deposited in the king's warehouse pursuant to the statute; and afterwards *C.* acting as agent for *A.* within the knowledge of the captain, makes an entry of it in his own name in the custom-house to avoid seizure: Held, that this was not such an acceptance of the cargo by *C.* as would make him liable to the captain for the freight. *Ward v. Felton*, T. 41 G. 3. 248
- 5 The captain of a troop for which forage is furnished, by the orders of a clerk appointed by such captain, is not liable in an action for money had and received for such forage, though present with the troop at the time; it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by government, and upon whom the captain is entitled to draw for a certain sum regulated by the returns of the preceding month. *Rice v. Chute*, T. 41 Geo. 3. 281
- 6 *Aliter*, if he had in effect received the money. *Rice v. Everitt*, T. 41 G. 3. 283
- 7 A seaman having contracted to go a voyage from *A.* to *B.* and back again, with a stipulation that he should not be entitled to his wages till the end of the voyage, cannot maintain a general indebitatus assumpsit to recover his wages pro rata as far as *B.*; though he were there wrongfully dismissed by the defendant, the captain; but his remedy is either for the breach of the special contract, or for such tortious act of the captain's whereby he was prevented from

- earning his wages. *Hulle v. Heightman*, H. 42 G. 3. 401
- 8 Upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and therefore if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part, (but arising from the fraud of the grower from whom he purchased,) such seller is not answerable, though the goods turned out to be unmerchantable. *Parkinson v. Lee*, E. 42 G. 3. 477
- 9 The plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies in order that he might collect for the principal the money due thereon from the underwriters, which was accordingly done, and the money was afterwards received by the defendant; held, that this was not a promise for the debt or default of another within the statute of frauds; and that the plaintiff might recover against the defendant as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received. *Castling v. Aubert*, E. 42 G. 3. 482
- 10 Money paid by one with full knowledge, or the means of such knowledge in his hands, of all the circumstances, cannot be recovered back again on account of such payment having been made under an ignorance of the law. *Bilbie v. Lumley*, T. 42 G. 3. 547
- 11 Qu. where such payment made under an uncertainty of the facts, *Chutfield v. Paxton*, M. 39 G. 3. cited. *ib.*
- 12 The law will not raise an implied promise in the parish where a pauper is settled to reimburse the money laid out by another parish, in which he happened to be, in providing necessary medical assistance for him. *Atkins v. Banwell*, T. 42 G. 3. 564

ATTORNEY.

- 1 An attorney has a lien upon a sum awarded in favour of his client, as well as recovered by judgment: and if after notice to the defendant the latter pay it over to the plaintiff; the plaintiff's attorney may compel a repayment of it to himself; and he shall not be prejudiced by a collusive release from the plaintiff to the defendant. *Ormerod v. Tate*, E. 41 G. 3. 223
- 2 One who executes a deed for another, under a power of attorney, must execute it in the name of his principal; but if that be done, it matters not in what form of words such execution is denoted by the signature of the names: as if opposite the seal be written "for J. B." (the principal,) "M. W."

(the attorney,) (*L. S.*) *Wilks and another v. Back*, H. 42 G. 3. 399

Attorney, Warrant of, to confess judgment.

See PRACTICE, No. 20, 21.

AVERAGE (GENERAL.)

An action upon promises lies by a ship owner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern. *Birkley v. Presgrave*, Hil. 41 G. 3. 118

AWARD.

See LIEN, No. 3.

- 1 Application to set aside awards, though for objections appearing on the face of them, must be made within the time limited by the 9 and 10 W. 3. c. 15. *Loundes v. Loundes*, Hil. 41 G. 3. 142
- 2 Where a verdict is taken pro forma at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount without first applying to the court for leave so to do. *Lee v. Lingard*, E. 42 G. 3. 200

BAIL.

- 1 In scire facias on the recognizance of bail, and scire feci returned, it is sufficient to fix the bail if they were summoned before the rising of the court on the return day. But the court will stay proceedings against both the bail, on payment of the sum sworn to and costs, although less than the damages recovered, or than the sum named in the process. *Clarke v. Bradshaw*, M. 41 G. 3. 57
- Tramel v. Rivaz*, T. 16 G. 3. S. P. there cited. 59
- 2 The scire facias against bail must lie four days in the office, as well where scire feci is returned as nihil. *Williams v. Mason*, M. 4 G. 2. cited *ib.* 58
- 3 Where the defendant was sued by original in London, the scire facias against the bail must be sued there also: and it does not help the plaintiff who sued out the scire facias in *Middlesex*, that bail had by mistake been put in there. *Harris and Another v. Calvert and Another*, T. 41 G. 3. 292
- 4 If the defendant's attorney or his clerk be put in as bail, the plaintiff must except to the bail, and cannot proceed as if the matter were a nullity. *R. v. The Sheriff of Surrey*, H. 42 G. 3, and *Foxall v. Bowerman*, *ib.* 417
- 5 An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested on bailable process is irregular, and he cannot be holden to special bail

thereon. *Davison v. Frost*, E. 42 G. 3. 473

- 6 Bail in error are not required by stat. 3. J. 1. c. 8, on error brought on a judgment by default in debt on a count for a promissory note, any more than on counts for goods sold and delivered, and on an account stated; though if there were one count, on which judgment was entered up, for which bail in error were not required, it seems sufficient to excuse the plaintiff in error. *Trier v. Bridgman*, E. 42 G. 3. 498
- 7 A writ of error, though not returned, is of itself a supersedeas; and may be pleaded by the bail to have been issued and allowed after the issuing and before the return of the ca. sa. against the principal, so as to avoid the proceedings against them in scire facias upon the recognizance of bail prosecuted after a return by the sheriff of non est inventus made pending such writ of error. *Sampson v. Brown*, T. 42 G. 3. 533

BAIL-BOND.

After a party arrested on civil process has been discharged on giving a bail-bond to the sheriff for his appearance at the return of the writ, it is optional in the sheriff whether he will accept the surrender of the party in discharge of the bail-bond before the return of the writ: and therefore though notice of such surrender were given to the sheriff and the gaoler in whose custody the party then was at the suit of another; after which the gaoler let the party out of custody; yet held that the gaoler was not liable upon his bond of indemnity to the sheriff as for an escape in the former suit; for the party was not legally in the custody of the sheriff or his gaoler merely by virtue of such notice or surrender. *Hamilton v. Wilson*, E. 41 G. 3. 192

BANKRUPT.

- 1 A discharge under a commission of bankrupt in a foreign country is no bar to an action for debt, arising here, against the bankrupt by a creditor, a subject of this country. *Smith v. Buchanan*, M. 41 G. 3. 19
- 2 Money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied is proveable as a debt under the commission of the bankrupt partner; although the solvent partner were not called upon to repay the debt to the joint creditor till after the bankruptcy of the other. But the solvent partner may recover from the bankrupt his share of such debt so paid after the bankruptcy to the joint creditor, notwithstanding the bankrupt has obtained his certificate. *Wright v. Hunter*, M. 41 G. 3. 26
- 3 *A.* engages as a partner in a particular transaction with *B. C.* and *D.* who were before partners; *B. C.* and *D.* become bankrupts, after which *A.* pays a debt due from himself and then to a joint creditor; held that these three partners constituted but one debtor to *A.* and he might recover from *B.* the proportion of *B. C.* and *D.* towards the joint debt, *B.* not having pleaded in abatement. *ib.*
- 4 A bill of exchange payable to *A.* or order, which was legal in its inception, was by him indorsed to *B.* for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury by whom it was paid to *B.*'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate; held that the indorsement of *A.* to *B.* on an usurious account did not avoid the bill in the hands of an innocent holder, by virtue of the statute of usury; and that *B.*'s assignees, being clothed with the rights of such innocent indorsee, were entitled to hold the bill against *A.* though as between *A.* and *B.* the security was void. *Parr v. Eliason*, M. 41 G. 3. 60
- 5 An agreement on discounting a bill, that the plaintiff should take in part payment another bill which had time to run as cash, although the full discount was taken, is usurious. *ib.*
- 6 After an act of bankruptcy committed by one of two partners, joint effects are sent away, which come to the defendant's hands; then the following partner dies, leaving the defendant his executor; and afterwards a commission of bankrupt is taken out against the surviving partner, and his estate assigned to the plaintiffs; held that they are tenants in common with the solvent partner, and after his decease with his representatives, by relation of law from the act of bankruptcy, and cannot therefore maintain trover against the defendant claiming under such solvent partner. *Smith v. Stocks*, E. 41 G. 3. 183
- 7 After an act of bankruptcy committed by one partner the other delivers goods of their joint property to a creditor for a joint debt, and dies; afterwards a commission issues against the surviving partner; held that the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods with the assignees of the bankrupt, by relation from the act of bankruptcy, which was in the lifetime of the solvent partner, and consequently that the assignees cannot maintain trover against such creditor. *Smith v. Oriell*, E. 41 G. 3. 188
- 8 *A.* desires leave to place certain long bills in *B.*'s hands and to be allowed permission to draw, without renewals, bills of shorter dates, and desires *B.* to calculate the sum to be drawn for, allowing commission; and the long bills indorsed by *A.* are inclosed to *B.* in the same letter. *B.* answers that agreeable to *A.*'s wishes, he had discounted the bills, and then specifies the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills, on

condition of being allowed to draw shorter bills; and *B.* having accepted *A.*'s bills, and such acceptances being dishonoured in consequence of *B.*'s bankruptcy, and the long bills having remained in specie in *B.*'s hands at the time of his bankruptcy, and *B.*'s assignees having afterwards received the value of them *A.* may recover the amount from them as money had and received to his use. *Parke v. Eliason*, Trin. 41 Geo. 3. 266

- 9 A trader orders bags of wool of defendants (merchants) in *December*, which are delivered on the 19th of *February* following; and by the course of dealing the trader has the option of returning the wool for which he has no call, though previously ordered. The trader being from home when the bags were delivered, on his return the same day gives directions not to have them opened or entered in his books, but only weighed off to see that they agreed with the invoice; he being then in embarrassed circumstances, and intending not to take them into the account of his stock if in the event he found himself unable to pursue his business. Afterwards, on the 4th and 5th of *March*, being then avowedly insolvent, he returns the bags with a letter to the merchants, declaring his situation, and hoping they will have no objection to take back the wool, and requesting the favor of a line of approbation thereof; which letter is received and the approbation given after an act of bankruptcy committed on the same day the letter was sent. Held that by the trader keeping possession of the goods so long, his option (which ought to have been exercised on the receipt of them) was gone; and that being in a state of insolvency and on the eve of bankruptcy, he could not exercise the power of restoring the goods to the vendors, though without any fraudulent concert with them; but that the trader's assignees are entitled to the property. *Neate v. Ball*, M. 42 G. 3. 387

- 10 If a trader become a bankrupt between the time of executing a bill of sale of a ship at sea to the defendant's, and the time of the defendant's complying with the requisites of the registry acts of the 26 G. 3. c. 60, and 34 G. 3. c. 68. s. 16. though such requisites were completed after the act of bankruptcy, and before the action brought, the property does not pass; but the assignees of the bankrupt may recover the possession of such ship in trover. *Moss v. Charnock*, E. 42 G. 3. 516

BARON AND FEME.

See WILL. No. 1. 2.

- A covenant by a husband to pay to trustees a certain annual sum by way of separate maintenance for his wife in case of their future separation, with the consent of such trustees or their executors, &c. is valid in law. *Rodney v. Chambers*, E. 42 G. 3. 463.

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

See WITNESS, No. 1. PARTERS, No. 2.

- 1 A promissory note written upon a stamp of greater value than the proper stamp required cannot be received in evidence, though the stamp were applicable to the same kind of instrument. *Farr v. Price*, Mich. 41 Geo. 3. 48
- 2 A bill of exchange payable to *A.* or order, which was legal in its inception, was by him indorsed to *B.* for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to *B.*'s assignees, after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate; held that the indorsement of *A.* to *B.* on an usurious account did not avoid the bill in the hands of an innocent holder, by virtue of the statute of usury; and that *B.*'s assignees, being clothed with the rights of such innocent indorsee, were entitled to hold the bill against *A.* though as between *A.* and *B.* the security was void. *Farr v. Eliason*, Mich. 41 Geo. 3. 60
- 2b. An agreement on discounting a bill, that the party should take in part payment another bill which had time to run as cash, although the full discount was taken, is usurious. *ib.*
- 3 A mere promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date for the amount of his demand, he should then have the money and would pay it, does not amount in law to an acceptance of the bill when drawn; and an indorsee for a valuable consideration, between whom and the drawee no communication passed at the time of his taking the bill, can neither recover upon the count as for an acceptance, nor on the general counts as for money had and received, &c. *Johnson v. Collins*, Mich. 41 Geo. 3. 63
- 4 But when plaintiff had lent money to the defendant, for which he took a promissory note on a wrong stamp, held, he might give parol evidence of the consideration to enable him to recover on the money counts. *Tyte v. Jones*, sittings at Westminster, 1788, cor. Lord Kenyon. 44
- 5 Though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him in the course of carrying on a trade in her own name by the consent of her husband, yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff; neither can the plaintiff recover upon the money counts under such circumstances. *Barlow v. Bishop*, East. 41 Geo. 3. 214
- 6 A draft on a banker, post-dated, and delivered before the day of the date, though not intended to be used till that day, requires

to be stamped, by the stat. 31 Geo. 3. c. 25. *Allen v. Keeves*, East. 41 Geo. 3. 216

BOND.

In an action on a judgment recovered on a bond, interest may be recovered in damages beyond the penalty of the bond. *McClure v. Dunkin*, East. 41 Geo. 3. *ib.*

BRIBERY.

See INDICTMENT, No. 3.

BRIDGE.

- 1 The county or riding is liable to the repair of a bridge built by trustees under a turnpike act; there being no special provision for exonerating them from the common law liability, or transferring it to others; though the trustees were enabled to raise tolls for the support of the roads. *R. v. The Inhabitants of the West Riding of Yorkshire*, E. 42 G. 3. 490
- 2 If a bridge be of public utility, and used by the public, the public must repair it, though built by an individual: aliter, if built by him for his own benefit, and so continued, without public utility, though used by the public, *ib.* 490
- 3 A bridge built in a public way without public utility is indictable as a nuisance; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. *ib.* 490
- 4 Where to an indictment against a Riding for not repairing a public carriage bridge, the plea alleged that certain townships had immemorially used to repair the said bridge; evidence that the townships had enlarged the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge, will not support the plea. *Mich. 28. G. 3. ib.* 495
- 5 Where townships have so enlarged a bridge which they were before bound to repair as a foot bridge, they shall still be liable pro rata. *ib.*
- 6 Where an individual builds a bridge which he dedicates to the public, by whom it is used, the county are bound to repair it. *ib.*
- 7 The county is liable to repair a bridge built in the highway and used by the public above forty years, though originally erected for the convenience of an individual. *R. v. The Inhabitants of the County of Glamorgan; cor. Lord Kenyon C. J. at Hereford in 1788.* 496

BROKER.

See LIEN, No. 6.

Where an English subject, in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker, in his own name, but informing him at the same time that the property was neutral; this is a sufficient indication to the broker that the party acted as agent, and not on his own account; and therefore the broker has no

lien on the policy so effected for his general balance against such agent, as between such broker and the principal. *Maass v. Henderson*, Hil. 41 Geo. 3. 169

CANDLES.

See EXCISE.

CARRIER.

The defendant a common carrier to and from *B.* through *W.* to *R.* employs distinct boats to carry to and from *B.* to *R.* and to and from *B.* to *W.* which pass on different days. The plaintiff knowing this, and having corn at *W.* which is threatened to be seized by a mob, writes to the defendant at *B.* to send a private boat quickly, on account of the state of the country, to take the corn to *B.* to which the defendant not returning any answer, and plaintiff fearing to wait till the day defendant's boat would, in the usual course of employment, go from *W.* to *B.* stops the boat passing by from *R.* to *B.* and without disclosing the circumstances to the boatman, prevails on him to take the corn on board, and then dispatches him forward in the night, having privately sent orders to open the lock at any time when he should pass. After a verdict for the defendant, negating that the corn was delivered in the usual course of dealing as a common carrier; held that the verdict might be sustained, either on the general ground of fraud in the plaintiff, or on the circumstances of the case, furnishing altogether evidence of a tacit stipulation on the part of defendant to do the best he could, but not to be answerable as a common carrier for the violence of the mob; or because it did not appear that the boatman, whose ordinary employment was between *R.* and *B.* had authority from the defendant to accept the goods at *W.* for *B.* much less to accept them in that manner. *Edwards and others v. Sherratt*, Trin. 41 G. 3. 293

CASES DOUBTED OR DENIED.

Webb v. Harvey, (2 Term Rep. 757.) 55

CERTIORARI.

- 1 The Court refused a criminal information against a Magistrate for returning to a writ of Certiorari a conviction of a party, in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the Magistrate's clerk, the conviction returned being warranted by the facts. *R. v. Barker*, Hil. 41 Geo. 3. 103.
- 2 A certiorari to remove an indictment from the sessions may be sued out by the prosecutor, without giving the six days previous notice required by the statute 18 Geo. 2. c. 18. § 5. in the case of removing "convictions, judgments, orders, and other (summary) proceedings." The effect of such writ is to remove all proceedings of the nature described therein which have taken place between the teste and return, al-

though the proceedings originated after the teste. The Magistrates below are bound to obey the writ after production of it, and notice to them in fact of such production, when sitting in their judicial capacity; and after that all further proceedings before them on the matter are erroneous. *R. v. Battams*, Hil. 41 Geo. 3. 158

- 3 If an order of removal be confirmed at the sessions, and both orders be removed into *B. R.* by certiorari on a case reserved, and this court disapprove of the orders, for want of jurisdiction of the removing magistrates appearing on the face of the original order; this court will quash both orders, without remitting back to the sessions to quash the original order, for the purpose of enabling them to give maintenance according to stat. 9 G. 1. c. 7. s. 9. and at any rate they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced. *R. v. The Inhabitants of Moor Critchell*, H. 42 G. 3. 436

COLLATERAL PROMISE.

See ASSUMPSIT, No. 9.

COMMITMENT.

- A defendant, being brought up for judgment after conviction, stands committed, pending the consideration of the judgment, unless the prosecutor consent to his standing out on bail. *R. v. Waddington*, Hil. 41 G. 3. 94

COMMONER.

- A commoner may maintain an action on the case for an injury done to the common, by taking away from thence the manure which was dropped on it by the cattle; though his proportion of the damage be found only to the amount of a farthing; at least the smallness of the damage found is no ground for a nonsuit. *Pindar v. Wadsworth*, H. 42 G. 3. 406

CONDITION PRECEDENT.

See AGREEMENT, No. 2. COVENANT, No. 3.

CONSIGNOR AND CONSIGNEE.

See STOPPING *in transitu*. LIEN.

CONTINUANCE DAY.

See PRACTICE, No. 10.

CONTRACT.

See PLEADING, No. 8, 9.

CONVEYANCE.

See INSOLVENT DEBTOR, No. 2.

CONVICTION.

- 1 The Court refused a criminal information against a Magistrate for returning to a writ of Certiorari, a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party

convicted by the Magistrate's clerk, the conviction returned being warranted by the facts. *R. v. Barker*, Hil. 41 G. 3. 108

- 2 Where an act gives power to a Magistrate on a summary conviction to award the reasonable charges of taking a distress, he must ascertain the amount in the conviction; and an adjudication that the defendant shall pay the reasonable charges of the levy is bad. *R. v. Symonds*, Hil. 41 G. 3. 104

- 3 A conviction on the stat. 5 G. 3. c. 14. for fishing without consent of the owner, "in part of a certain stream which runneth between *B.* in the parish of *A.* in the county of *W.* and *C.* in the same parish "and county," quashed, because it did not appear that the intermediate course of the stream between the two termini in which the offence was alleged to be committed was in the county of *W.* and within the jurisdiction of the convicting Magistrate. *R. v. Edwards*, H. 41 G. 3. 143

- 4 If a conviction before a justice of Peace on the game laws state that the defendant was present at the time when the information was read and the witnesses examined, and that when called on for his defence, he produced no evidence, and did not require any farther time; that is sufficient, without stating that he was previously summoned to answer, &c. *Rex v. Stone*, Trin. 41 G. 3. 809

- 5 Qu. Whether it be necessary for the prosecutor to negative by evidence, as well as in the information, the qualifications of the defendant to kill game?—and Qu. Whether the negative of such qualifications must be repeated in the adjudicatory part of the conviction, or whether it be not sufficient to convict the defendant of the offence aforesaid, referring to the previous part of the conviction, which sets forth the information in which such qualifications were specifically negatived. *Rex v. Stone*, Trin. 41 G. 3. *ib.*

- 6 A conviction wherein the information does not negative the defendant's qualifications set forth in the statute 22 & 23 Car. 2 is bad. *Rex v. Jarvis*, H. 30 G. 2 cited. 811

- 7 Whether the conviction should not state expressly that the evidence was given in the defendant's presence. Dub. per Lord Kenyon in *R. v. Stone*, Trin. 41 G. 3. 812

- 8 If the convicting magistrate give a proper date to the time of the conviction upon the face of it, and afterwards add an impossible date to the time when he set his hand and seal to the conviction (being before the offence committed), the latter may be rejected as surplusage. *R. v. Pictou*, H. 42. G. 3. 423

- 9 It is enough that the conviction sets forth that the witness was examined on oath, without stating that the magistrate had authority to administer the oath. *ib.*

COPYHOLD.

- 1 A covenant to surrender a copyhold to a purchaser, and to make and do all acts,

deeds, &c. for the perfect surrendering and assuring the premises at the costs and charges of the seller, is not broken by non-payment of the fine to the Lord on the admission of the purchaser; for the title is perfected by the admittance of the tenant, and the fine is not due till after the admittance. *Graham v. Sims*, Trin. 41 Geo. 3.

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COPYRIGHT.

- 1 An action lies to recover damages "for pirating the new corrections and additions to an old work." *Gary v. Longman and Rees*, East. 41 G. 3. 180
- 2 No such action lies for publishing sea charts on an improved and more useful principle, with material corrections, though many of the lines were copied from old charts. *Sayre v. Moore sittings after H.H.* 25 G. 3. 181
- 3 But the action lies for a servile imitation of parts of a book of chronology, though other parts of the book were different. *Dr. Trusler v. Murray, sittings after Mich.* 30 G. 3. 182

CORPORATION.

See Quo Warranto—Information in nature of.

- 1 If it appear with sufficient certainty to the Court, that a person has been elected Mayor of a borough on the days appointed by the usage, who is not qualified to accept the office, by reason of his not having previously taken the sacrament within the time limited by law, they will grant a mandamus to the electors to proceed to a new election under the stat. 11 Geo. 1. c. 4. § 2. as if no election had in fact been made. *Rez v. Corporation of Bedford*, Mich. 41 Geo. 3. 53
- 2 An action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff, at least not without proof of malice. *Harman v. Tappenden*, Trin. 41 G. 3. 271
- 3 Where a power of creating freemen is shown to have been once vested in the body at large of a prescriptive corporation, the exercise of it cannot be sustained in a select part of the same corporation continued by charters under other names of incorporation; there being no express grant of such a power to the select body by any such charters, nor even any by-law to that effect; even supposing such a power could be transferred by a by-law from the whole to a part of the same corporation; although it be stated in the plea and admitted by the demurrer, that the same power which was immemorially exercised by the whole body down to the period of the granting and acceptance of the charters of James 1. and Charles 2. had been since those charters, &c. continually exercised by the select body in question; and although such charters contained a confirmation of all former privileges, &c. under whatever names of incor-

poration theretofore enjoyed. *Rez v. Holland*, M. 42 G. 3. 266

COSTS.

- 1 After a venire de novo awarded upon an imperfect special verdict, and a new trial granted after a verdict for the plaintiff on the second trial, and the jury find again for the plaintiff on the third trial, he is only entitled to the costs of the last trial, unless it be otherwise expressed in the rule granting the new trial. *Bird v. Appleton*, Mich. 41 G. 3. 69
- 2 Where in trespass quare cl. fr. the defendant pleads not guilty, and a justification of a right of way, and the plaintiff traverses the right of way, and new assigns extra viam; and there is a verdict for the plaintiff with 1s. damages on the new assignment, and for the defendant on the justification; the plaintiff is entitled to full costs, deducting the defendant's costs on the issue found for him. *Martin v. Vallance*, East. 41 G. 3. 176
- 3 To a plea of set-off of a sum due under a recognizance, and also of another sum upon a simple contract, it seems that a replication, protesting that the plaintiff did not acknowledge, &c. and then pleading that he was not indebted in manner and form as the defendant had in pleading alleged, and concluding to the country, is bad; inasmuch as it refers matter of record to the cognizance of a jury. But as it was a sham plea, the plaintiff had leave to amend without payment of costs. *Solomons v. Lyon*, East. 41 G. 3. 186
- 4 If one of the plaintiffs reside within reach of the process of the Court, security will not be required for the costs, though the other plaintiff be a foreigner residing abroad, and though the first mentioned plaintiff be a bankrupt in execution for debt. *McConnel v. Vartett & al.* East. 41 G. 3. 214
- 5 An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment; and if after notice to the defendant the latter pay it over to the plaintiff, the plaintiff's attorney may compel a repayment of it to himself; and he shall not be prejudiced by a collusive release from the plaintiff to the defendant. *Ormerod v. Tate*, East. 41 G. 3. 227
- 6 Where an insufficient answer is given to a rule nisi for a mandamus to a corporation to restore a freeman improperly disfranchised, in consequence of which a peremptory mandamus issues to restore him, no costs are recoverable by stat. 9 Ann. c. 20. *Harman v. Tappenden*, Trin. 41 G. 3. 271
- 7 The party succeeding is not entitled to the costs of examining witnesses on interrogatories, or taking office copies of depositions: but each party applying pays his own expence unless it be otherwise expressed in the rule. *Stephens v. Crichton*, E. 42 G. 3. 452
- 8 Where the plaintiffs sued as executors in covenant against the lessor of their testa-

tor, for not providing timber for the repair of the demised premises, upon a demand made by the plaintiffs after the death of their testator ; held that they were not liable to pay the costs of a judgment as in case of a nonsuit ; inasmuch as though the breach happened in their own time, they could only declare as executors upon the contract made with their testator. *Cooke v. Lucas*, E. 41 G. 3. 514

COURT LEET.

See CUSTOM OR JURORS. No. 1.
QVO WARRANTO No. 5.

COURTS MARTIAL

Courts martial are bound by the same rules of evidence as the courts of common law ; and their general proceedings, where not otherwise regulated by act of parliament, must follow the same course. The case of the mutineers of the *Bounty*, ship of his Majesty (cited) 159
Mr. Stratford's case. *ib.*

COVENANT.

- 1 A covenant to end with *A.*, his executors, administrators and assigns, and to and with *B.* and his assigns, to pay an annuity to *A.*, his executors, &c. during *B.*'s life, is a joint covenant to *A.* and *B.*, in which they have a joint legal interest, although the benefit be for *A.* only ; and therefore on the death of *A.* the right of action survives to *B.*, and *A.*'s administrator cannot sue on the covenant. *Anderson v. Martindale*, T. 41 G. 3. 244
- 2 A grant by lessees for lives of all their estate, right, title, interest, &c. in the premises, to one and his executors, habendum to him and his executors for 99 years, if the lives should so long exist, in as large, ample, and beneficial way, &c. as the grantors, their heirs, &c. held, is no assignment of the freehold, and consequently not of the whole interest of the grantors in their lease ; and therefore the reversioners (the lives being expired within the term) cannot maintain covenant against the under-lessee for not delivering up the premises in good repair. *Earl of Derby v. Taylor*, T. 41 G. 3. 246
- 3 *A.* covenants that he will on or before a certain day convey to *B.* by such conveyance as *B.*'s counsel should advise, all the ground before conveyed to him by *C.* ; in consideration of which *B.* covenants to pay a certain sum, and reserve certain rents, &c. to *A.*, and to lay out a certain sum on the premises ; held, that *A.* cannot maintain covenant against *B.* without averring such a conveyance, or a readiness to convey to *B.* on or before the day all the land, but that *B.* prevented him by some act or neglect of his. And it is not sufficient to maintain covenant to shew that after the day *B.* accepted a conveyance of ground rents in lieu of part of the land, and accepted that and the conveyance of the oth-

er part in lieu of the conveyance covenanted to be made by *A.* : for this is a substitution of a different agreement by parol, to which the covenant does not apply. *Heard v. Watts*, T. 41 G. 3. 300

- 4 A covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c. for the perfect surrendering and assuring the premises at the costs and charges of the seller, is not broken by non-payment of the fine to the lord on the admission of the purchaser ; for the title is perfected by the admittance of the tenant, and the fine is not due till after the admittance. *Graham v. Sime*, T. 41 G. 3. 306
- 5 A covenant by a husband to pay to trustees a certain annual sum, by way of separate maintenance, for his wife, in case of their future separation with the consent of such trustees or their executors, &c. is valid in law. *Rodney v. Chambers*, E. 42 G. 3. 468
- 6 An action of covenant lies against the assignee of a lessee of an estate for a part of the rent ; as in such case the action is brought on a real contract in respect of the land, and not on a personal contract : and in case of eviction the rent may be apportioned, as in debt or replevin. Aliter in covenant against the lessee himself, who is liable on his personal contract. *Stevenson v. Lambard*, T. 42 G. 3. 511

CROSS REMAINDERS.

See DEVISE, No. 3, 8, 9.

Cross remainders cannot be implied in a deed ; and can only be raised by proper words of limitation : however plainly expressed the intention of the parties may be. Under a limitation in a marriage settlement, to the use of all and every the daughter and daughters of, &c. to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters ; and for default of such issue, to the right heirs, &c. held that there were no cross remainders between the daughters or their issue. *Doe v. Worsley*, E. 41 G. 3. 207

CUSTOM.

A custom to swear the jurors at one court leet, to inquire, and to return their presentments at the next court, is had in law. *Davidson v. Moscrop*, M. 42 G. 3. 359

DEED.

See CROSS REMAINDERS, No. 1. INSOLVENT DEBTOR, No. 2.

- 1 One who executes a deed for another under a power of attorney must execute it in the name of his principal ; but if that be done, it matters not in what form of words such execution is denoted by the signature of the names : as if opposite the seal be written " for *J. B.*" (the principal), " *M.*"

- W.*" (the attorney), (*"L. S."*) *Wilks and Another v. Back*, H. 42 G. 3. 399
- 2 Where in an action on a bond, evidence was offered that diligent enquiry had been made after one of the subscribing witnesses at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him; held sufficient to let in proof of the hand of the other subscribing witness, who had since become interested as administratrix to the obligee, and was a plaintiff on the record. *Cunliffe v. Sef-ton*, H. 42 G. 3. 418
- 3 If a subscribing witness to a deed be abroad, out of the jurisdiction of the court, and not amenable to the process at the time of the trial, evidence of his handwriting is admissible; though it do not appear whether he be domiciled or settled abroad. *Prince v. Blackburn*, H. 42 G. 3. 448

DELIVERY OF GOODS.

See EVIDENCE, No. 3. STOPPING *in transitu*.

DEPOSIT.

- A.* desires leave to place certain long bills in *B.*'s hands, and to be allowed permission to draw without renewal bills of shorter dates, and desires *B.* to calculate the sum to be drawn for, allowing commission: and the long bills indorsed by *A.* are inclosed to *B.* in the same letter. *B.* answers that agreeable to *A.*'s wishes he had discounted the bills, and then specifies the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills on condition of being allowed to draw shorter bills: and *B.* having accepted *A.*'s bills, and such acceptances being dishonoured in consequence of *B.*'s bankruptcy, and the long bills having remained in specie in *B.*'s hands at the time of his bankruptcy, and *B.*'s assignees having afterwards received the value of them; *A.* may recover the amount from them as money had and received to his use. *Parke v. Eliason* and others, T. 41 G. 3. 266

DEVISE.

See WILL. LIMITATION.

- 1 *E. C.* by his will, after making several pecuniary bequests, devised to *A. W.* the income of a certain cottage and her living in it if she thought proper; and to *E. W.* the half of a certain estate; and all the rest and residue of his goods, &c. and also his lands, &c. he gave to his wife for life, with power "to give what she thought proper of her said effects" to her sisters the said *A.* and *E. W.* for their lives: and after the death of his wife and her two sisters he gave all his lands, &c. to his heir at law. Held that the widow had power to devise to her sisters the real as well as personal

estate before bequeathed to her by her husband; and *A. W.* having died before the widow, that the latter might among the rest bequeath the cottage, in which *A. W.* had a life interest, to her other sister *E. W.* *Doe d. Chilcott v. White*, M. 41 G. 3. 32

- 2 *A.* devised a reversionary estate to *S. T.* and *A. L.* as tenants in common in fee; and in case both or either of them should happen to die in the lifetime of *T. H.* (who had an estate for life in the premises), then the share or shares of her on them so dying to go "unto all and every such child and children, grandchild and grandchildren, of the said *S. T.* and *A. L.* respectively, as should be living at the time of her or their decease, and to the issue of such of them as should be then dead, and have left issue, and to his, her, and their respective heirs, as tenants in common: yet, nevertheless, so as all the descendants of the said *S. T.* should together be entitled only to one moiety of the said premises, and all the descendants of the said *A. L.* should together be entitled to no more than the other moiety thereof; and that none of such descendants, either of *S. T.* or *A. L.* should be entitled to any greater or other share of the said respective moieties of the said respective premises, than his, her, or their father or mother would have been entitled to, if living;" under this devise the grandchildren of *S. T.* and *A. L.*, though in case at the date of the will, can only take per stripes, and not per capita, in substitution of such of their parents respectively as happened to be dead at the determination of *T. H.*'s life estate. *Legard v. Harworth*, M. 41 G. 3. 78
- 3 A devise of a messuage and land to *R. C.* for the term only of his natural life, and after his decease to the issue of the said *R. C.* as tenants in common; but in case the said *R. C.* shall die without leaving issue, then a devise of the same to *E. H.* in fee; gives to *R. C.* an estate tail in order to effectuate the general intent. And cross remainders cannot be implied between the issue of *R. C.* *Doe d. Cock v. Cooper*, H. 41 G. 3. 122.
- 4 Under a devise to *A.* of all the testator's whole estate and effects, real and personal, &c. "who shall hold, and enjoy the same as a place of inheritance to her and her children, or her issue for ever. And if it should happen that *A.* should die, leaving no child or children, or *A.*'s children should die without issue," then over; held, that *A.* took an estate tail. *Wood & ux. v. Baron*, H. 41 G. 3. 135
- 5 Under a devise to *A.* for her natural life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of *A.* to be begotten, severally, successively, and in remainder one after another, according to seniority, &c. the elder of such

- sons and the heirs male of his body being always preferred before the youngest of such son and sons, and the heirs male of their bodies; and in default of such issue, to the daughter and daughters of the body of *A.* as tenants in common in tail, remainder over; held *A.* only took an estate for life, and that the words *heirs male of her body* were explained by the subsequent words to mean first and other sons. *Doe d. Sweet v. Herring*, H. 41 G. 3. 13?
- 6 The words *heirs male of the body* may be construed to be words of purchase, if they are clearly so intended to be. *ib.*
- 7 Under a devise of "a messuage or tenement, buildings, lands, or premises, now in my own possession; and all other my real estate whatsoever, in *M.* or in any other place," &c. to *A.* for life; and after her decease a devise of "the said messuage or tenement, buildings, lands, and premises," to *B.* in fee; held, that the word *premises*, used in the devise to *B.*, carried all that was before given to *A.*, and was not confined to the premises in the testator's own possession; and consequently that a reversion in fee of another messuage, to which the testator was entitled after the determination of a life in being, in whose possession it was outstanding during his lifetime, passed to the devisee in remainder. *Doe v. Meakin*, E. 41 G. 3. 225
- 8 Under a limitation (after estates for life to *A.* and *B.*) of "all and every the said premises to all and every the younger children of *B.* begotten or to be begotten, if more than one equally to be divided amongst them, and to the heirs of their respective body and bodies as tenants in common, &c. and if only one child, then to such only child, and to the heirs of his or her body issuing; and for want of such issue," (a devise of) the said premises to "*C. N.* &c. (with several limitations over);" "and for want of such issue," then the testator divided the said premises between several branches of his family. Held that cross remainders were to be implied between the younger children of *B.* from the apparent intention of the testator from the whole of the will, notwithstanding the use of the word *respective* in such devise. *Watson v. Foxon*, M. 42 G. 3. 350
- 9 A devise by *A.* (having 3 sons and 7 daughters) to his sons in succession for life, remainder to the heirs male of their bodies, remainder to the heirs female of their bodies, remainder to all and every his daughter and daughters (if two or more) as tenants in common, and to the heirs of her and their bodies, remainder to the heirs of the deviser's brother; gives cross remainders to the daughters. Between more than two the presumption is against cross remainders; but this may be controlled by a plain intention to the contrary. *Doe v. Burville*, E. 13 G. 3 cited *ib.* 355
- 10 *A.* gave by will his tenant-right which he held by lease to *A. I.* but not to dispose of or sell it: and if he refused to dwell there, or keep it in his own possession, then that *J. I.* should have his tenant-right of the farm. *A. I.* having borrowed money left the title deeds with his creditor as a security, and confessed a judgment to secure the money; and having also given a judgment to another creditor who issued an execution against him, the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution: and *A. I.* having left the premises and ceased to dwell there on the day of the execution, before the sheriff entered; held that *J. I.* the remainderman was entitled to enter, the estate of *A. I.* having determined by such his acts, *Doe d. Ibbotson v. Hawke*, T. 42 G. 3. 553
- DISTRESS.**
- Trespass lies against a landlord, who on making a distress for rent turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress. *Etherton v. Popplewell*, H. 41 G. 3. 82
- EJECTMENT.**
- 1 Ejectment will not lie for a messuage and tenement. *Doe v. Plowman*, E. 41 G. 3. 219
- 2 A landlord gave a notice to quit different parts of a farm at different times, which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired, the landlord, fearing that the witness by whom he was to prove the notice would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectment; held the second notice was no waiver of the first. *Doe v. Williams*, H. 42 G. 3. 442
- 3 Where a defendant in ejectment held as to the arable lands from Candlemas, and as to the rest of the farm from May-day, the rent being payable at Michaelmas and Lady-day, and notice to quit was given 6 months before May-day, but not 6 months before Candlemas; Lord Kenyon, at Stafford sum. ss. 1788, nonsuited the plaintiff. *Quære*, Whether the notice to quit were given half a year before Lady-day? *Doe d. Ld. Grey de Wilton*, v. —, cited in *Doe v. Calvert*. 509
- 4 A rector may recover in ejectment against his lessee on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the stat. 13 Eliz. c. 20, and the lease to the defendant describing him as doctor in divinity produced by him at the trial in support of his title, is prima facie evidence of his being such: as he is therein described to be, so as also to avoid the lease under the stat. 31 H. 8. c. 13. s. 3. *Frogmorton d. Fleming v. Scott*, T. 42 G. 3. 546

ELECTION.

See CORPORATION, No. 1.

ELY, *Isle of, Jurisdiction.*

See JURISDICTION, No. 2.

ENGROSSING.

See FORESTALLING.

ERROR, WRIT OF.

See PRACTICE, No. 18.

ESCAPE.

See SHERIFF, No. 1.

EVIDENCE

See RECTOR, No. 1. WAY, No. 1, 2.

- 1 The examination of a soldier touching his settlement, which is made evidence by the mutiny act, must be authenticated before it can be received in evidence and does not prove itself prima facie, though the paper appear to be in the form prescribed by the statute. *Rez v. Inhabitants of Bilton with Harrowgate*, M. 41 G. 3. 32
- 2 Semble the hand writing of the magistrates signing the examination ought at least to be proved. *ib.*
- 3 Where goods are ponderous and incapable of being handed over by actual delivery, it may be done by that which is tantamount, as by delivering the key of a warehouse in which they are. Therefore, after a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person, by whom, though against the vendee's approbation, it was taken away, is sufficient to warrant the jury in finding a delivery to and acceptance by the vendee; thereby taking the case out of the stat. of frauds. *Chaplin v. Rogers*, H. 41 G. 3. 105
- 4 Where a public statute for erecting a court of inferior jurisdiction, enacts that "no action for any debt not amounting to 40s. and recoverable by that act shall be brought against any person residing within the jurisdiction," &c. such statute is a defence upon the general issue to a party bringing himself within it, who is sued in the superior courts. *Parker v. Elding*, E. 41 G. 3. 177
- 5 A verdict against one defendant in trespass upon an issue of a justification of a public right of way, negating such right, is evidence in trespass for breaking and entering the same close against another defendant, who justified under the same right. And the latter cannot shew that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial; the record being conclusive as to the fact of such a finding, though not as to the truth of it between other parties. *Reed v. Jackson*, E. 41 G. 3. 179
- 6 Reputation would be evidence as to the right of way in such case. *ib.*

- 7 An ex parte examination in writing of a pauper, taken on oath before two magistrates for the purpose of removing him to the place of his settlement, is not admissible in evidence upon an appeal against an order of removal, on the ground of the pauper's having absconded between the notice of appeal and the trial of it before the quarter sessions; although the respondents had used due diligence, but without effect, to procure the attendance of the pauper as a witness; he not having been heard of from the time of his absconding. *Rez v. Nuneham Courtney*, E. 41 G. 3. 187
- 8 Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such an acknowledgment in writing cannot be given in evidence per se, in respect to the cash items, amounting to above 40s. in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove that upon calling over each article to the defendant, he admitted that he had received the same; and the witness may refresh his memory by referring to the accounts. *Jacob v. Lindsay*, E. 41 G. 3. 227
- 9 A settlement by being rated and paying rates cannot be proved by evidence of paying only, without the production of the rate, or accounting reasonably for the non-production of it; although the payer was both owner and occupier of the estate for which he paid the rate. *R. v. The Inhabitants of Coppul*, M. 42 G. 3. 345
- 10 Neither the hearsay of a pauper who is dead, nor his ex parte examination in writing taken on oath before two magistrates, touching his settlement, are inadmissible evidence of such settlement. *R. v. The Inhabitants of Ferry Frystone*, M. 42 G. 3. 354. And *R. v. The Inhabitants of Chadderton*, M. 42 G. 3. 346
- 11 So an ex parte examination of a pauper touching his settlement cannot be received in evidence of such settlement, though he be dead. *R. v. The Inhabitants of Abergwilly*, M. 42 G. 3. 362
- 12 The payment of money into court upon a count stating a special contract, is an admission of such contract, and narrows the inquiry to the quantum of damages sustained by the breach thereof. Therefore if the plaintiff declare as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays 5l. into court, the latter cannot give in evidence that the contract was that he should not be answerable for goods lost to a greater value than 5l. unless entered and paid for accordingly: though if no money had been paid into court, the plaintiff must have been nonsuited on such evidence. *Yule v. Wilan*, M. 42 G. 3. and *Pigott v. Dunn*, E. 36 G. 3. cited *ib.* 392
- 13 Where, in an action on a bond, evidence

- was offered that diligent inquiry had been made after one of the subscribing witnesses at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him; held sufficient to let in proof of the hand-writing of the other subscribing witness, who had since become interested as administratrix to the obligee, and was a plaintiff on the record. *Cunliffe v. Sefton*, H. 42 G. 3. 418
- 14 If a subscribing witness to a deed be abroad, out of the jurisdiction of the court, and not amenable to its process at the time of the trial, evidence of his hand-writing is admissible; though it do not appear whether he be domiciled or settled abroad. *Prince v. Blackburn*, H. 42 G. 2. 448
- 15 Where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death. *Wilson v. Hodges*, E. 42 G. 3. 476
- 16 Where a defendant is brought up to receive judgment after conviction, an affidavit by the prosecutor in aggravation, stating that a third person who refused to join in the affidavit had informed him that the defendant after the trial had repeated in his bearing the libellous matter for which he was indicted, is not admissible; at least not without swearing that such third person was under the control or influence of the defendant. *R. v. Pinkerton*, E. 42 G. 3. 497
- 17 Where the stat. 7 & 8 W. 3. c. 30. s. 24, enables the commissioners of excise to summon witnesses before them upon a charge exhibited against another for an offence against the excise laws, and an information in a collateral proceeding recited such summons to have been duly made; proof of a printed summons distributed and issued in blank by order of the commissioners to their agents, and afterwards filled up by one of them without any special directions from the board, is sufficient; although not signed by any of the commissioners, nor issued in their individual names; such having been the constant usage in that respect since the introduction of the excise. *R. v. Stevenon*, E. 42 G. 3. 499
- 18 In an action on the case in tort for a breach of a warranty of goods, the *scienter* need not be charged, nor if charged need it be proved. *Williams v. Allison*, T. 42 G. 3. 587

EXAMINATION.

See EVIDENCE, No. 5.

EXCISE.

- 1 The stat. 26 G. 3. c. 77. s. 18, which enacts that no person shall prosecute "any action, bill, plaint, or information, in any of the King's courts," for the recovery of any excise penalty, &c. unless prosecuted by the Attorney General or some revenue officer, is confined to the *superior courts of record*; and therefore an information for a

penalty for removing wax candles from the place of manufactory before the duty paid (by s. 10. of the same statute.) may be prosecuted before the commissioners of excise by one not averred to be such officer. *R. v. Stevenon*, E. 42 G. 3. 499

- 2 And the information stating in effect that the candles were home-made candles seems to be sufficient, without expressly naming them *British* candles: the words of the act being "British spirits, soap, and candles;" though supposing this would have been a ground for error or appeal in the original information, it is no objection to an information in a collateral proceeding for conspiring to prevent the examination of a witness before the commissioners of excise on such prior information, which is only stated by way of recital in the information for the conspiracy. *ib.*
- 3 The same answer applies to an uncertainty (if any) in the charge of the first information recited; in negating the excuse of a prior condemnation as well as prior payment of the duty before removal; though that seems proper enough. *ib.*
- 4 So the issuing of process against the original defendant, or the joining issue on the information recited, is immaterial as to the charging the offence of the subsequent conspiracy. *ib.*
- 5 Neither is it necessary, at least in such collateral proceeding, to recite that the original information was prosecuted, before the commissioners by name, though it be not averred to have been before three or more of them, according to stat. 1 G. 2. stat. 2. c. 16. *ib.*
- 6 Neither is it necessary in reciting such prior information, averred to have been made within three months after the offence committed, according to stat. 1 W. & M. c. 54. s. 13, also to aver notice thereof to the original defendant within a week, as is directed to be given by the same statute. *ib.*
- 7 Where the stat. 7 & 8 W. 3. c. 30. s. 24, enables the commissioners of excise to summon witnesses before them, upon a charge exhibited against another for an offence against the excise laws, and an information in a collateral proceeding recited such summons to have been duly made; proof of a printed summons distributed and issued in blank by order of the commissioners to their agents, and afterwards filled up by one of them without any special directions from the board, is sufficient, although not signed by any of the commissioners, nor issued in their individual names; such having been the constant usage in that respect since the introduction of the excise. *ib.*

EXECUTION.

- 1 Process sued out by the crown against a defendant to recover penalties, upon which judgment for the crown is afterwards obtained, entitles the king's execution to

have priority within the stat. 35 Hen. 8. c. 39. s. 24, before the execution of a subject, whose execution had issued and been commenced on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the commencement of the king's process: the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. *Butler v. Butler*, H. 41 G. 3. 171

Attorney-General v. Aldersey, M. 1786, S. P. *ib.*

- 2 A defendant cannot be taken in execution twice on the same judgment, though he were discharged the first time by the plaintiff's consent upon an express undertaking that he should be liable to be taken in execution again if he failed to comply with the terms agreed on, which he did. *Blackburn v. Stupart*, H. 42 G. 3. 445

EXECUTORS.

See COBTS, No. 3.

FALSE REPRESENTATION.

See ACTION ON THE CASE, No. 1.

FALSE REPRESENTATION OF CREDIT.

See ACTION ON THE CASE, No. 1.

FEME COVERT.

See WILL, No. 1, 2.

- 1 The court will discharge a feme covert on common bail, though at the time of the credit given to her by the plaintiff, she mistakenly informed him that her husband was dead; there being no fraud intended. *Pitt v. Thompson*, M. 41 G. 3. 24
- 2 So where the plaintiff at the time of the credit given to the defendant knew that she had a husband living abroad, though separated from him by consent. *March v. Capelli*, H. 39 G. 3. 25
- 3 Though a note were given to a married woman, knowing her to be such, with intent that she should indorse it to the plaintiff in payment of a debt which she owed him, (in the course of carrying on a trade in her own name by the consent of her husband,) yet the property in the note vested in the husband by the delivery to the wife, and no interest passed by her indorsement to the plaintiff; neither can the plaintiff recover upon the money counts under such circumstances. *Barlow v. Bishop*, E. 41 G. 3. 214

FINE.

One tenant in common levying a fine of the whole, and taking the rents and profits afterwards without account for nearly five years is no evidence from whence the jury should be directed (against the justice of the case) to find an ouster of his companion at the time of the fine levied; and consequently the latter may maintain ejectment without making an actual entry. *Peaceable*

d. Hornblower v. Read and Another, T. 41 G. 3. 277

FISHERY.

See CONVICTION, No. 3.

FOREIGN COURTS.

See PRIZE, No. 1.

In justifying a trespass under the process of a foreign court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior courts: but at any rate a plea which only states that the court abroad was governed by foreign laws, that the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question in such court, having competent jurisdiction in that behalf, *et taliter processum*, &c. that the defendant was ordered by the said court, having competent authority in that behalf to seize the property, is bad; being too general; and not giving the plaintiff notice whether the defendant justified as an officer of the court, or party to the cause; or of what nature the charge was, or by whom instituted, or what the order of seizure was, whether absolute or quousque, &c. *Collett v. Lord Keith*, E. 42 G. 3. 453

FOREIGN LAWS.

See BANKRUPT, No. 1.

FORESTALLING, ENGROSSING, &c.

The following were declared to be offences at common law, and not done away by the repeal of the stat. 5 & 6 Ed. 6. c. 14.

- 1 Spreading rumours with intent to enhance the price of hops, in the hearing of hop planters, dealers, and others that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c. with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price. *R. v. Waddington*, H. 41. G. 3. 84
- 2 Spreading such rumours generally, with intent to enhance the price of hops. *ib.*
- 3 Endeavouring to enhance the price by persuading divers dealers, &c. not to take their hops to market, and to abstain from selling for a long time. *ib.*
- 4 Engrossing large quantities of hops, by buying from many particular persons by name, certain quantities, with intent to resell the same for an unreasonable profit, and thereby to enhance the price. *ib.*
- 5 Ad idem, stating the particular contracts. *ib.*
- 6 Getting into his hands large quantities, by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to re-sell at an unreasonable profit, and thereby greatly to enhance the price. *ib.*
- 7 Buying large quantities with like intent *ib.*

- 8 Buying large quantities with intent to resell at exorbitant profit, &c. 84
- 9 Unlawfully engrossing, by buying large quantities with like intent. *R. v. Waddington*, H. 41 G. 3. *ib.*
- 10 Engrossing hops of divers persons by name, with intent to re-sell at an unreasonable profit, and thereby enhance the price. *R. v. Waddington*, H. 41 G. 3. 94
- 11 Engrossing hops then growing, by forehand bargains, with like intent. *ib.*
- 12 Buying large quantities of hops of divers persons mentioned, with intent to prevent their being brought to market, and to re-sell them at an unreasonable profit and thereby enhance the price. *ib.* 84
- 13 Buying all the growth of hops in several parishes by forehand bargains with the like intent. *ib.*
- 14 Buying hops of divers persons with intent to re-sell at an unreasonable profit, and thereby enhance the price. *ib.* *ib.*
- 15 Buying all the growth of hops on certain lands in certain parishes, by forehand bargains with intent to sell at an unreasonable price and to enhance the price. *ib.*
- 16 Endeavouring to enhance the price of hops, by persuading hop owners not to sell, &c. *ib.*
- 17 Engrossing, by buying large quantities of persons unknown, with intent to resell at an exorbitant profit, &c. *ib.*
- 18 Buying large quantities with like intent *ib.*
- 19 Buying hops then growing, with intent to re-sell at an exorbitant price and lucre. *Rex v. Waddington*, Hil. 41 Geo. 3. 84
- 20 To forestall any commodity which is become a common victual and necessary of life, or used as an ingredient in the making or preservation of any victual, though not formerly used or considered as such, is an offence at common law. *ib.*
- 21 Indictment for engrossing a great quantity of fish, geese, and ducks, held bad, without specifying the quantity of each. *R. v. Gilbert*, Trin. 41 Geo. 3. 284

FORFEITURE.

A. gave by will his tenant-right which he held by lease to *A. I.* but not to dispose of or sell it; and if he refused to dwell there, or keep it in his own possession, then that *J. I.* should have his tenant-right of the farm. *A. I.* having borrowed money, left the title deeds with his creditor as a security, and confessed a judgment to secure the money; and having also given a judgment to another creditor who issued an execution against him, the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution: and *A. I.* having left the premises and ceased to dwell there on the day of the execution, before the sheriff entered; held that *J. I.* the remainderman was entitled to enter, the estate of *A. I.* having determined by such his acts. *Doe d. Ibbotson v. Hawke*, T. 42 G. 3. 558

FORGERY.

- 1 The sessions have no jurisdiction over the offence of forgery at common law, nor can they take cognizance of it as a cheat. *R. v. Micah Gibbs*, Hil. 41 Geo. 3. 97
- 2 Therefore, they cannot hold cognizance of an indictment charging that the defendant being a person assessed to certain duties granted upon income, by certain Commissioners, and under pretence of being aggrieved, having appealed to certain other Commissioners, and contriving and intending to deceive the said Commissioners, and to induce them to believe that the particulars of his income delivered in, and the deductions claimed by him to be allowed, had been inquired into, examined, and approved by one *Richard Elze*, then being clerk to the first mentioned Commissioners, and with a fraudulent intent to give effect to his appeal and to evade the duty, at the bottom of a paper purporting to be a schedule of the defendant's income, did forge, &c. the letters *R. E.* purporting to be the initials of the said clerk, and did exhibit to the Commissioners of Appeal the said paper, &c. against the peace, &c. *ib.*
- 3 Indictment charging that defendant having in his possession a bill of exchange, purporting to be directed to one *J. King*, by the name and description of *J. King*, forged the acceptance of the said *J. King*, &c. is bad; because purport means what appears on the face of the instrument, and the bill did not purport to be drawn on *J. King*. *R. v. Reading*, O. B. 1793. 100
- R. v. Gilchrist*, O. B. 1795. S. P. *ib.*
- 4 So where the indictment charged that the bill purported to be directed to *Richard Down*, *Henry Thornton*, *John Freer*, and *John Cornwall*, jun. by the name and description of *Messrs. Down, Thornton & Co.* *R. v. Edsall*, Southampton Sp. Ass. 1798. *ib.*
- 5 An indictment for forgery must set out the forged instrument in words and figures. *R. v. Mason*, Northumberland Sum. Ass. 1792. *ib.*
- 6 But upon an indictment for publishing a forged receipt for money, with the name *Stephen Wilkors*, &c. for the sum of 11. 4s. it was holden sufficient to set forth only the receipt itself as follows: "18th March 1773. Received the contents above, by me *Stephen Wilkors*;" without setting forth the account itself to which such receipt referred, and at the foot of which it was subscribed; that account being only evidence to make out the charge. *R. v. Testick*, Bodmin, Sum. Ass. 1774. *ib.*

100

FRAUDS—STATUTE OF.

See ASSUMPSIT, No. 9.

The plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the

plaintiff's giving up to him such policies, in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant: held that this was not a promise for the debt or default of another within the statute of frauds: and that the plaintiff might recover against the defendant as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received, &c. *Castling v. Aubert*, E. 42 G. 8. 482

FREIGHT.

A. and *B.* merchants abroad, ship tobacco for *Liverpool*, consigned to *A.* himself there, to whose order the bills of lading are made. One of these bills is sent inclosed in a letter from the shippers to *C.* at *Liverpool*, advising him of such consignment to *A.* and that *A.* intended to proceed to *Liverpool*; but in case he should not arrive in time, desiring *C.* to do the best for them. The tobacco having arrived in a damaged state before *A.* is required to be landed, and is deposited in the King's warehouse, pursuant to the statute; and afterwards *C.* acting as agent for *A.* within the knowledge of the Captain, makes an entry of it in his own name in the Custom-house, to avoid seizure. Held that this was not such an acceptance of the cargo by *C.* as would make him liable to the Captain for the freight. *Ward v. Fallon*, Trin. 41 Geo. 8. 248

GAOLER.

See SHERIFF, No. 1.

GENERAL ISSUE.

See EVIDENCE, No. 4.

GIBRALTAR.

See MUTINY ACT.

GLEBE.

One in possession of glebe land under a lease void by the stat. 13 Eliz. c. 20, by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrong doer. *Graham v. Peat*, Hil. 41 Geo. 8. 128

GRANT.

A grant by lessees for lives of all their estate, right, title, interest, &c. in the premises to one and his executors, habendum to him and his executors for 99 years, if the lives should so long live, in as large, ample, and beneficial way, &c. as the grantors, their heirs, &c. held, is no assignment of the freehold, and consequently not of the whole interest of the grantors in their lease; and therefore the reversioners (the lives being expired within the term) cannot maintain covenant against the under lessees for not delivering up the premises in

good repair. *E. of Derby v. Taylor*, Trin. 41 Geo. 8. 246

HABEAS CORPUS. (return to)

1 By the mutiny act the King may make articles of war, and constitute Courts Martial with power to try and punish, as well in *Great Britain*, &c. as in *Gibraltar*, &c. By a subsequent clause no soldier shall, by such articles of war, be subjected to the punishment of death or loss of limb within *Great Britain*, &c. (omitting *Gibraltar*), for any crime not expressed to be so punishable by the act. Then, by the articles of war, persons found guilty by a Court Martial at *Gibraltar*, of theft, robbery, &c. or of having used violence, or committed any offence against the persons or property of others, "shall suffer death, or such other punishment, according to the nature and degree of the offence, as by the sentence of such Court Martial shall be awarded;" held that the Court Martial have a discretionary power by such words, and are not restricted to pass such sentence on a delinquent as would be warranted by the law of *England*. But supposing they were, yet that a return to a habeas corpus, stating that upon a certain charge exhibited against the defendant before such a Court, for certain offences alleged to have been committed by him at *Gibraltar*, such proceedings were had, that the Court Martial, after hearing the charge and the defence, found the defendant guilty of receiving certain goods named, from the warehouse of *W.* (at *G.*) knowing them to be stolen, in breach of the articles of war, whereupon they sentenced him to transportation for fourteen years, is good. For such a sentence would be warranted here by the stat. 4 G. 1 c. 11, if the principal were convicted of the felony, and the receiver were indicted as accessory after the fact. *R. v. Suddis*, H. 41 G. 8. 156

2 It seems a sufficient return to a habeas corpus, that the defendant is in custody under the sentence of a Court of competent jurisdiction to inquire of the offence, and to pass such a sentence, without setting forth the particular circumstances necessary to warrant such a sentence. *ib.*

HIGHWAY.

1 By s. 19, of stat. 13 G. 3. c. 78, where an order of justices has been made for stopping up a road an appeal is given to "the party grieved by any such order or proceeding, &c. at the next quarter sessions after such order made or proceeding had," &c. held that at all events an appeal to the "sessions next after the actual obstruction of the road" was too late; the party having had sufficient notice of the order in time to have appealed to a preceding sessions, before which time the surveyors of the highway had begun to stop up the road. *R. v. The Justices of Pembrokeshire*, H. 42 G. 8. 431

- 2 Under the stat. 18 G. 3. c. 84. s. 88, B. R. may apportion the fine for non-repair of a road between the parish and the trustees of a turnpike, though the indictment were originally preferred at the assizes, and afterwards removed thither by certiorari. *R. v. The Inhabitants of Upper Papworth*, T. 42 G. 3. 522

HOPS.

See FORESTALLING.

HUNDRED.

- 1 Where a mob attacked a baker's house, and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves, below the marketable value; held, this was evidence for the jury of a felonious beginning to demolish the house, &c. within the fourth section of the riot act; and that the plaintiff might recover for the damage done to the house, in an action against the hundred on the 6th section, but not for the value of the flour so sold, that not being consequential to the act of demolition; nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house on the opposite side of the street, of which the lock only was burst; that not being a beginning to demolish, &c. within the act, with the view with which it appeared to be done. *Burrows v. Wright*, T. 41 G. 3. 298
- 2 Where a mob, after beginning to demolish and pull down a house, steal flour therein, or force the owner to sell it at an under price, the value thereof cannot be recovered in an action against the hundred on the 6th section of the riot act, 1 G. 1 stat. 2. c. 5, such stealing and robbery being substantive felonies, and not within the offence created by the 4th section of the act. But flour which was spoiled or destroyed at the time of such beginning to demolish, &c. may be so recovered. *Greasley v. Higginbotham*, T. 41 G. 3. 308

HUSBAND AND WIFE.

See BARON AND FEME.

INDICTMENT.

- 1 To solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting; and such offence is indictable at the sessions, having a tendency to a breach of the peace. *Rex v. Higgins*, M. 42 G. 3. 337
- 2 In an indictment on the st. 80 G. 2. c. 24, for obtaining money on false pretences, it is sufficient to allege that the defendant unlawfully, knowingly, and designedly pretended so and so; by means of which said false pretences he obtained the money; afterwards negating such pretences to be true: though it be not in terms alleg-

ed that he *falsely* pretended, &c. and it seems it would have been sufficient to allege that he obtained the money by such and such pretences, averring such pretences to be false. *Rex v. Airey*, M. 42 G. 3. 347

- 3 The court will not quash a defective indictment on the motion of the prosecutor after plea, pleaded before another good indictment be found. *R. v. Dr. Wynn*, H. 42 G. 3. 487

INDICTMENT. INFORMATION.

See FORESTALLING, &c. FORGERY.

- 1 Information granted for endeavouring to procure the appointment of certain persons to be overseers of the poor, with a view to derive a private advantage to the party. *R. v. Joliffe*, E. 32 G. 3. (cited.) 89
- 2 The Court refused a criminal information against a Magistrate for returning to a writ of certiorari a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the Magistrate's clerk, the conviction returned being warranted by the facts. *R. v. Barker*, H. 41 G. 3. 103
- 3 Indictment lies against one who was clerk to the agent for French prisoners of war, for taking bribes in order to procure the exchange of some of them out of their turn. *R. v. Beale*, E. 38 G. 3. (cited.) 102
- 4 Indictment for engrossing a great quantity of fish, geese and ducks, held bad, without specifying the quantity of each. *R. v. Gilbert*, T. 41 G. 3. 284

INSOLVENT DEBTOR.

- 1 One who was arrested at the suit of the plaintiff, and liberated on bail prior to 1st March 1801, and was afterwards committed in execution at the suit of the same plaintiff before the passing of the Insolvent Act of the 41 G. 3. c. 70, is entitled to be discharged by the 6th section of that act on the conditions thereby imposed. And this where he was so taken in execution upon a judgment confessed for the amount of the costs as well as for the original debt, for which he had been arrested by writ out of an inferior court before the 1st of March; the 84th section providing that no person entitled to the benefit of the act should be imprisoned by reason of any judgment for any debt, costs, &c. owing or growing due before the said 1st of March. *Billet v. M'Arthy*, H. 42 G. 3. 402
- 2 A conveyance to a creditor of an insolvent debtor's estate by the clerk of the peace (in whom it is vested upon the order for the insolvent's discharge by the stat. 41 G. 3. c. 70. s. 15, until the subsequent conveyance to the creditor), does not vest the estate in such creditor by relation, either to the date of the order or of the conveyance, but only from the actual execution of such conveyance by the clerk of the peace. Therefore such creditor cannot recover in

ejectment upon a demise laid before the execution, though after the estate was out of the insolvent debtor, and the order was made to convey the same to the lessor. *Doe d. Walley v. Telling*, E. 42 G. 3. 451

INSURANCE.

See LIEN.

- 1 The premium paid on an illegal insurance to cover a trading with an enemy cannot be recovered back, though the underwriter cannot be compelled to make good the loss. *Vandyck v. Hewitt*, M. 41 G. 3. 62
- 2 Where an *English* subject in time of war who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was *neutral*; this is a sufficient indication to the broker that the party acted as *agent*, and not on his own account; and therefore the broker has no lien on the policy so effected for his general balance against such agent, as between such broker and the principal.—*Masses v. Henderson*, H. 41 G. 3. 169
- 3 It is legal to trade with the subjects of an enemy's country by the King's licence. But if it be provided in such licence, that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond being given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods. *Vandyck v. Whitmore*, E. 41 G. 3. 233
- 4 If a licence to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient that the goods were shipped before the expiration of the time, the ship not sailing till afterwards. *ib.*
- 5 Where an act prohibiting intercourse with *America*, then in a state of rebellion, enabled the *British* Commanders to grant licences in a certain form to carry provisions to places in *America* occupied by the *British*, and a licence was granted not following the requisitions of the act, it was holden void; and consequently the trading being illegal, the goods sent under the licence could not be insured. *Vanhartals v. Halbed*, M. 31 G. 3. 238
- 6 An assured upon an *American* ship and cargo, provided with such a passport as is required by the treaty between *America* and *France*, and with all other usual *American* papers and documents, is entitled to recover against an underwriter of a policy on such ship and goods, in case of a capture by a *French* privateer, notwithstanding a sentence of condemnation of the same as lawful prize by a *French* Court of Admiralty; such sentence proceeding on the ground of a breach of *French* ordinances, requiring certain particulars to be observed in respect of the ship documents beyond what was necessary by the treaty. *Price v. Bell*, T. 41 G. 3. 320
- 7 Qu. Whether if a ship be not warranted of any particular country, there be an implied warranty in a policy of insurance that she shall be properly documented according to the laws of that country, and her particular treaties with foreign states. *Price v. Bell*, T. 41 G. 3. 320
- 8 On an insurance on ship and goods valued at so much, on a voyage to *Africa* and the *West Indies*, the assured is entitled to recover the whole sum on a total loss which happened in the latest period of the voyage; although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and maintenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. *Shase v. Felton*, M. 42 G. 3. 320
- 9 Where a ship insured arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterwards she sunk; held that the assured might recover as for a total loss, though her cargo was saved and brought to a profitable market. *ib.*
- 10 A declaration on a policy of insurance on a foreign ship need not aver any interest in the assured; though there be no such words as "interest or no interest" in the policy. *Nantes v. Thompson*, E. 42 G. 3. 569
- 11 A sentence of condemnation by a *French* court sitting in *Spain*, of a prize taken by a *French* privateer and carried in there (*Spain* being then a belligerent ally of *France* in the war against *Great Britain*) is valid; and such condemnation, proceeding on the ground of the property being enemy's and *British*, is conclusive in an action on a policy against the underwriter by the assured who had insured it as *Danish*, which in fact it was, *Denmark* being then neutral. *Oddy v. Bosvill*, T. 42 G. 3. 549
- 12 The profits of a cargo employed in trade on the coast of *Africa* are an insurable interest. *Barclay v. Cousins*, T. 42 G. 3. 581
- 13 So an insurance on imaginary profit from *Bordeaux* to *Hamburgh*, (which was explained to mean the profit which a cargo of indigo belonging to the assured would produce on the sale thereof at *Hamburgh*, if it arrived safe) was holden good. *Henrickson v. Margelson*, B. R. Mich. 1776, cited *ib.* 584
- 14 The rule, by which to calculate a partial loss on a policy on goods by reason of sea-damage, is the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds; it being settled that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination. *Johnson v. Shedden*, T. 42 G. 3. 598

INTEREST.

- 1 Execution cannot be taken out for interest upon a sum awarded to be paid on a particular day, and for which sum judgment was entered up. But it in the province of the jury (or the arbitrator interposed in their place) to allow interest or not in the damages. *Lee v. Lingard*, E. 41 G. 3. 200
- 2 In an action on a judgment recovered on a bond, interest may be recovered in damages beyond the penalty of the bond. *McClure v. Dunkin*, E. 41 G. 3. 216

ISSUE—PROOF OF.

Where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death. *Wilson v. Hodges*, E. 42 G. 3. 476

JOINDER IN ACTION.

See COVENANT, No. 1.

To a declaration against one upon joint promises by him and another, whom he avers to be outlawed, a plea of nul tiel record of outlawry is in effect a plea in abatement, for want of parties; and therefore, if it conclude in bar it is bad on general demurrer, and the plaintiff is entitled to judgment quod recuperet, &c. *Nowlan v. Geddes*, T. 41 G. 3. 307

JOINT AND SEVERAL COVENANT.

See COVENANT, No. 1.

JUDGMENT.

See AWARD, No. 2.

- 1 To a plea in abatement of misnomer of plaintiff, replication that the plaintiff was known as well by the one name as the other: upon demurrer over-ruled, there must be judgment of respondeas ouster, and not quod recuperet. *Bowen v. Shapcott*, T. 41 G. 3. 265
- 2 To a declaration against one upon joint promises by him and another, whom he avers to be outlawed, a plea of nul tiel record of outlawry is in effect a plea in abatement, for want of parties; and therefore, if it conclude in bar, it is bad on general demurrer, and the plaintiff is entitled to judgment quod recuperet, &c. *Nowlan v. Geddes*, T. 41 G. 3. 307

JURISDICTION.

See EXCISE.

- 1 A certiorari to remove an indictment from the sessions may be sued out by the prosecutor, without giving the six days previous notice required by the stat. 13 Geo. 2, c. 18 § 5, in the case of removing "convictions, judgments, orders, and other summary proceedings." The effect of such writ is to remove all proceedings of the nature described therein which have taken place between the teste and return, although the proceedings originated after the teste. The Magistrates below are bound to obey the writ after production of it, and notice to them in fact of such production when sitting

in their judicial capacity, and after that all farther proceedings before them on the matter are erroneous. *R. v. Ballams*, H. 41 G. 3. 153

- 2 Where a public statute for erecting a Court of Inferior Jurisdiction enacts that "no action for any debt not amounting to 40s. and recoverable by that act shall be brought against any person residing within the jurisdiction," &c. such statute is a defence upon the general issue to a party bringing himself within it, who is sued in the superior Courts. *Parker v. Elding*, E. 41 G. 3. 177
- 3 Where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; and it is not enough to describe themselves justices of the peace in and for the said county, although the proper county were named in the margin, and were also named last before such description of the justices. *R. v. The Inhabitants of Moor Critchell*, M. 42 G. 3. 364
- 4 By s. 1. of the stat. 39 and 40 G. 3. c. 104, the jurisdiction of the Court of Requests in London is enlarged from debts of 40s. to 5l. from the 30th September 1800: and by s. 12, if any action shall be commenced in any other court to recover any debt not exceeding 5l. within the jurisdiction, the plaintiff shall not recover any costs, &c.: held that the words "shall be commenced" must by necessary construction be restrained to the date of the 30th September, and not to the passing of the act, which was on the 9th of July preceding. *Whilborn v. Evans*, M. 42 G. 3. 396
- 5 After an appointment of four overseers for a parish by the magistrates at one meeting, they are functi officio, and no other magistrates can discharge one of the persons so appointed, though by his desire, and appoint another; but the party must appeal to the sessions to get his discharge. *R. v. The Inhabitants of Great Marlow*, H. 42 G. 3. 446
- 6 Semble, the magistrates making the appointment must be together at the time. *ib.*

JURORS.

A custom to swear the jurors at one court leet to inquire, and return their presentments at the next court, is bad in law. *Davidson v. Moscrop*, M. 42 G. 3. 359

KEELMAN.

See PRESSING.

LANDLORD AND TENANT.

See DISTRESS, No. 1. COVENANT, No. 5, 6, or RENT.

To trespass for breaking and entering, &c. and pulling down and taking away certain buildings, &c. The defendant as to the breaking and entering suffered judgment by default, and pleaded not guilty as to the rest. Held that such plea was sustained

by shewing that the building taken away, which was of wood, was erected by him as tenant of the premises on a foundation of brick for the purpose of carrying on his trade, and that he still continued in possession of the premises at the time when, &c. though the term was then expired. *Penton v. Robart*, M. 42 G. 3. 374

LARCENY AND ROBBERY.

1 Where a mob attacked a baker's house, and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves, below the marketable value; held, this was evidence for the jury of a felonious beginning to demolish the house, &c. within the 4th section of the riot act; and that the plaintiff might recover for the damage done to the house, in an action against the hundred, on the 6th section but not for the value of the flour so sold; that not being consequential to the act of demolition nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house on the opposite side of the street, of which the lock only was burst; that not being a beginning to demolish, &c. within the act, with the view with which it appeared to have been done. *Burrows v. Wright and Another*, T. 41 G. 3. 298

2 Where a mob after beginning to demolish and pull down a house, steal flour therein, or force the owner to sell it at an under price, the value thereof cannot be recovered in an action against the hundred, on the 6th section of the riot act, 1 Geo. 1. st. 2. c. 5, such stealing and robbery being substantive felonies, and not within the offence created by the 4th section of the act. But flour which was spoiled or destroyed at the time of such beginning to demolish, &c. may be so recovered. *Greaseley v. Higginbotham*, T. 41 G. 3. 308

LEASE.

See FORFEITURE, No. 1.

1 A grant by lessees for lives of all their estate, right, title, interest, &c. in the premises to one and his executors, habendum to him and his executors, for 99 years, if the lives should so long live in as large, ample, and beneficial way, &c. as the grantors, their heirs, &c. held, is no assignment of the freehold, and consequently not of the whole interest of the grantors in their lease; and therefore the reversioners, (the lives being expired within the term) cannot maintain covenant against the under lessee for not delivering up the premises in good repair. *Eurl of Derby v. Taylor*, T. 41 G. 3. 246

2 Under a power in a will to lease in possession and not in reversion, a lease for years executed the 29th March to the then tenant in possession, habendum as to the arable from the 18th February preceding, and as to the pasture from the 5th April then next,

&c. under a yearly rent payable quarterly on 19th July, 10th October, 10th January, and 10th April, is void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power. *Doe d. Allan v. Calvert*, E. 42 G. 3. 505

LECTURER.

See MANDAMUS, No. 8.

LIBEL.

See SLANDER.

After judgment on the defendant for a libel, the court refused to make an order on the prosecutor to deposit the original libellous papers with the officer of the court. *R. v. Cator*, T. 42 G. 3. 498

LICENCE.

See TRADING WITH ENEMY.

LIEN.

1 One who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account and at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods in transitu, and procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage. *Sweet v. Pym*, M. 41 G. 3. 18

2 Where an English subject in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time, that the property was neutral; this is a sufficient indication to the broker that the party acted as agent, and not on his own account, and therefore the broker has no lien on the policy so effected for his general balance against such agent, as between such broker and the principal. *Maass v. Henderson*, H. 41 G. 3.

3 An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment: and if after notice to the defendant the latter pay it over to the plaintiff; the plaintiff's attorney may compel a re-payment of it to himself; and he shall not be prejudiced by a collusive release from the plaintiff to the defendant. *Ormerod v. Tate*, E. 41 G. 3. 227

4 Quære, Whether a captain of a ship parts with his lien on goods for his freight by depositing them in the king's warehouse, pursuant to the requisitions of an act of parliament? *Ward v. Felton*, T. 41 G. 3. 248

5 A principal gives notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence draw bills on him, which the factor accepts; and then the principal dies, and his executors direct the captain of the ship to follow his former orders; who thereupon delivers the ship into the possession of the

factor, who sells the same : held that the factor has a lien upon the proceeds, as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due. *Hammonds v. Barclay*, H. 42 G. 3. 438

- 6 The assignee of a policy of insurance on goods, who became such by the indorsement to him of the bill of lading of the goods by the consignor after he had directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance ; and can only claim, subject to that lien, the money received on such policy by the broker, in whose hands it was deposited for that purpose by the correspondent. But the broker has no sub-lien on the policy for the general balance of his own account with such correspondent, if he knew at the time that the policy was effected for another person. *Man v. Shipfner*, T. 42 G. 8. 572

LIME-WORKS.

See POOR RATE, No. 1.

- 1 Cross-remainders cannot be implied in a deed ; and can only be raised by proper words of limitation ; however plainly expressed the intention of the parties may be. Under a limitation in a marriage settlement to the use of all and every the daughter and daughters of, &c. to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters ; and for default of such issue to the right heirs, &c. held, that there were no cross-remainders between the daughters or their issue. *Doe v. Worsley*, East. 41 Geo. 8. 207
- 2 A power of appointment under a marriage-settlement, unto and among all or any the child or children of the marriage, for such estates as the husband and wife, or the survivor of them, should from time to time, either with or without power of revocation, direct, limit or appoint, may be executed by the survivor, after a joint appointment, reserving to them and the survivor a power of revocation and appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, &c. remainder to the daughter in fee ; all the limitations subsequent to that to the eldest son for life are void, as being an excess beyond the power ; and the ultimate remainder dependant upon such intermediate limitations, though made in favour of one of the objects of the power, is also void ; and shall not be accelerated by the event of such void intermediate limitations not having

taken effect, for want of issue male of the eldest son, &c. to whom the appointment was made. For an appointment not good in its creation, will not become so by subsequent circumstances. And such an appointment being by deed, cannot be construed cypres, so as to give the sons estates tail, as perhaps might have been the case if the appointment had been by will. *Brudenelle v. Elwes*, East. 41 Geo. 8. 219

- 3 There may be a limitation to one unborn for life only, but not to the issue of such an one for life. *ib.* 228

LIMITATION OF ACTION.

Where the commander of one of the King's armed vessels seized a vessel and cargo at sea, and brought them into the next port on suspicion of smuggling, and after process in the Exchequer the owner obtained an order for re-delivery, under which he obtained only part of the goods from the defendant ; the owner cannot maintain trover for the remainder if the action were brought after three months from the original seizure, though within three months from the order for the re-delivery. *Saunders v. Saunders*, E. 42 G. 8. 450

MANDAMUS.

- 1 If it appear with sufficient certainty to the court, that a person has been elected mayor of a borough on the day appointed by the usage, who is not qualified to accept the office, by reason of his not having previously taken the sacrament within the time limited by law, they will grant a mandamus to the electors to proceed to a new election under the stat. 11 Geo. 1 c. 4. s. 2. as if no election had in fact been made. *Rez v. The Corporation of Bedford*, Mich. 41 Geo. 8. 58
- 2 Though by the stat. 9 Ann. c. 20. s. 2: the prosecutor of a mandamus to which there is a return, and issue taken on the facts therein, had an option to try the question in the same country in which he might have brought an action for a false return ; yet if all the material facts are alleged in one country, and issue taken thereon there, he cannot issue the venire facias into another country, though he might originally have alleged the facts there, and have there brought his action for a false return. *Rez v. The Mayor & c. of Newcastle*, Mich. 41 Geo. 8. 70
- 3 The stat. 35 Geo. 3 c. 101. s. 2. after enabling justices to suspend orders of removal of poor persons, and to order the charges thereby incurred to be defrayed by the pauper's parish, and to direct the charges to be levied by warrant of distress, enacts, that if the parties against whom it is issued are out of the jurisdiction of the justice granting the warrant, it shall be indorsed by some other justice within whose jurisdiction they are : this is peremptory upon the latter upon request made. *Rez v. Kynaston*, Mich. 41 Geo. 8. 172

- 4 Where the father and son were removed from *A.* to *B.* by two several orders of removal; and the parish-officers of *A.* and *B.* agreed that the removal of the son should follow that of the father, without the expence of a separate appeal; in consequence of which an appeal was only entered against the order removing the father; and after the sessions had determined that the father was settled in *A.*, and had quashed that order, *A.* refused to take back the son; *B. R.* granted a mandamus to the sessions to receive and determine the appeal against the order removing the son, though at a subsequent sessions to that holden next after the order of removal made; the appeal being directed to be entered nunc pro tunc with proper continuances. *Rez v. The Justices of Wiltshire*, Trin. 41 Geo. 3. 328
- 5 A mandamus was granted to the sessions to receive an appeal which was presented during the next sessions after an order of removal made, though not presented till after the day on which, by the practice of that sessions, appeals were required to be entered. *Rez v. The Justices of Leicester*, East 23 Geo. 3. n. 330
- 6 Upon an information in nature of quo warranto against one for claiming the office of alderman, if he disclaim, and judgment of ouster be given against him, he is concluded from shewing to a second information for exercising the same office, that he was duly elected before such first information and judgment of ouster, and that he was afterwards sworn in by virtue of a peremptory mandamus from this court. *R. v. Clarke*, M. 42 G. 3. 368
- 7 A mandamus to swear one into an office confers no title in itself to such office. *Ib.* and *R. v. The Burgesses of Truro*, 35 G. 3 cited *ib.* 372
- 8 Where no immemorial custom appeared to appoint a lecturer in a parish church, and on the contrary it appeared that the lectureship was founded in 1658, when the episcopal constitution was suspended, and consequently there could not be the joint assent of the bishop, the rector, and the vicar to the endowment; a mandamus to the bishop to licence a lecturer, without the assent of the vicar, was denied; though it appeared that the lectureship was originally endowed by the rector with an annual stipend, payable out of the impropriate rectory, and that several lecturers had from time to time been accepted by the bishops and vicars for the time being. *R. v. The Bishop of Exeter*, T. 42 G. 3. 544

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A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master. But he is liable to answer for any damage arising to another from the negligence or unskilfulness of his servant acting in his

employ. *M. Manus v. Crickett*, Mich. 41 Geo. 3. 67

MILITARY OFFICER.

- 1 A captain of a troop, during the time of his absence, and while another is in the actual command of it, by whom the orders for subsistence are issued, and the subsistence money is received from government, is not liable to pay for subsistence furnished to the men, though such captain was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders. *Myrtle v. Beaver*, Hil. 41 Geo. 3. 80
- 2 The captain of a troop for which forage is furnished, by the orders of a clerk appointed by such captain, is not liable in an action for money had and received for such forage, though present with the troop at the time; it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by government, and upon whom the captain is entitled to draw for a certain sum regulated by the returns of the preceding month. *Rice v. Chute*, T. 41 G. 3. 281
- 3 *Aliter*, if he had in effect received the money. *Rice v. Everitt*, T. 41 G. 3. 288

MISDEMEANOR.

See INDICTMENT, No. 56.

MONOPOLY.

See FORESTALLING.

MUTINY-ACT.

See SETTLEMENT.—EVIDENCE, No. 1.

By the mutiny-act the king may make articles of war and constitute courts martial with power to try and punish as well in *Great Britain*, &c. as in *Gibraltar*, &c. By a subsequent clause no soldier shall by such articles of war be subjected to the punishment of death or loss of limb within *Great Britain*, &c. (omitting *Gibraltar*,) for any crime not expressed to be so punishable by the act. Then by the articles of war persons found guilty by a court martial at *Gibraltar* of theft, robbery, &c. or of having used violence, or committed any offence against the persons or property of others, "shall suffer death or such other punishment, according to the nature and degree of the offence, as by the sentence of such court-martial shall be awarded;" held that the court-martial have discretionary power by such words, and are not restricted to pass such sentence on a delinquent as would be warranted by the law of *England*. But supposing they were, yet that a return to a habeas corpus, stating that upon a certain charge exhibited against the defendant before such a court, for certain offences alleged to have been committed by him at *Gibraltar*, such proceedings were had that the court-martial, after hearing the charge and the defence, found the defendant guilty of receiving certain goods

named, from the warehouse of *W.* (at *G.*) knowing them to be stolen, in breach of the articles of war, whereupon they sentenced him to transportation for 14 years, is good. For such a sentence would be warranted here by the stat. 4 G. 1. c. 11, if the principal were convicted of the felony, and the receiver were indicted as accessory after the fact. *Rez v. Suddis*, H. 41 G. 3. 156

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- A bridge built in a public way without public utility is indictable as a nuisance; and so it is if built colourable in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. *R. v. The Inhabitants of the West Riding of Yorkshire*, E. 42 G. 3. 490

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- A bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron. *Leph v. Lewis*, E. 41 G. 3. 195

ORDER OF JUSTICES.

See WAY, No. 1.

OUSTER—JUDGMENT OF

See QUO WARRANTO, No. 3.

OVERSEER OF THE POOR.

- 1 An appointment of one overseer alone for a township is bad in law; the stat. 13 & 14 Car. 2. c. 12, requiring at least two; and a certificate granted by such overseer is void, and gives no security to the certificated parish against the gaining of a settlement there by the party named therein; such certificate not being made pursuant to the stat. 8 & 9 W. 3. c. 30, which requires it to be made "by the churchwardens and overseers, or the major part, or by the overseers where there are no churchwardens. *R. v. The Inhabitants of Clifton*, H. 42 G. 3. 4 11
- 2 After an appointment of four overseers for a parish by the magistrates at one meeting, they are functi officio; and no other magistrates can afterwards, upon the claim of one of the persons so appointed to be exempted, appoint another in his place; but the party must appeal to the sessions to get his discharge. *R. v. The Inhabitants of Great Marlow*, H. 42 G. 3. 446
- 3 And this objection to the second appoint-

ment may be disclosed to this court on affidavit, upon the removal of the appointment hither by, certiorari, who will thereupon quash the same. *ib.*

- 3 Semble also, that the magistrates making the appointment must be together at the time the act is done. *ib.*

PARTNERS.

- 1 Money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied, is proveable as a debt under the commission of the bankrupt partner; although the solvent partner were not called upon to repay the debt to the joint creditor till after the bankruptcy of the other. But the solvent partner may recover from the bankrupt his share of such debt so paid, after the bankruptcy, to the joint creditor, notwithstanding the bankrupt has obtained his certificate. *Wright v. Hunter*, M. 41 G. 3. 26
- 2 *A.* engages as a partner in a particular transaction with *B.*, *C.*, and *D.*, who were before partners; *B.*, *C.*, and *D.* become bankrupts, after which *A.* pays a debt due from himself, and them to a joint creditor; held that these three partners constituted but one debtor to *A.*, and that he might recover from *B.* the proportion of *B.*, *C.*, and *D.* towards the joint debt; *B.* not having pleaded in abatement. *ib.*
- 3 Two (of three partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor in their joint names: but such security is fraudulent and void as against the third partner, and cannot be recovered in an action against the three, wherein one only of the original partners pleaded to the action. *Shirreff v. Wilkes*, M. 41 G. 3. 1
- 4 *Vide Gregson v. Hulton and another*, B. R. E. 22 (i. 3; and *Marsh v. Vansommer and another*, *Guildhall*, M. 1786. (cited) *ib.* 49
- 5 After an act of bankruptcy committed by one of two partners, joint effects are sent away, which come to the defendant's hands; then the solvent partner dies, leaving the defendant his executor; afterwards a commission of bankrupt is taken out against the surviving partner, and his estate assigned to the plaintiffs: held that they are tenant in common with the solvent partner, and after his decease, with his representatives, by relation of law from the act of bankruptcy, and cannot therefore maintain trover against the defendant claiming under such solvent partner. *Smith v. Stokes*, E. 41 G. 3. 39
- 6 After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt, and dies; and afterwards a commission issues against the surviving partner, held that the creditor, by virtue of such

- 4 Where the father and son were removed from *A.* to *B.* by two several orders of removal; and the parish-officers of *A.* and *B.* agreed that the removal of the son should follow that of the father, without the expence of a separate appeal; in consequence of which an appeal was only entered against the order removing the father; and after the sessions had determined that the father was settled in *A.*, and had quashed that order, *A.* refused to take back the son; *B. R.* granted a mandamus to the sessions to receive and determine the appeal against the order removing the son, though at a subsequent sessions to that holden next after the order of removal made; the appeal being directed to be entered *nunc pro tunc* with proper continuances. *Rez v. The Justices of Wiltshire*, Trin. 41 Geo. 3. 328
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See QUO WARRANTO, No. 3.

OVERSEER OF THE POOR.

- 1 An appointment of one overseer alone for a township is bad in law; the stat. 13 & 14 Car. 2. c. 12, requiring at least two; and a certificate granted by such overseer is void, and gives no security to the certificated parish against the gaining of a settlement there by the party named therein; such certificate not being made pursuant to the stat. 8 & 9 W. 3. c. 30, which requires it to be made "by the churchwardens and overseers, or the major part, or by the overseers where there are no churchwardens. *R. v. The Inhabitants of Clifton*, H. 42 G. 3. 4 11
- 2 After an appointment of four overseers for a parish by the magistrates at one meeting, they are functi officio; and no other magistrates can afterwards, upon the claim of one of the persons so appointed to be exempted, appoint another in his place; but the party must appeal to the sessions to get his discharge. *R. v. The Inhabitants of Great Marlow*, H. 42 G. 3. 446
- 3 And this objection to the second appoint-

ment may be disclosed to this court on affidavit, upon the removal of the appointment hither by certiorari, who will thereupon quash the same. *ib.*

- 3 Semble also, that the magistrates making the appointment must be together at the time the act is done. *ib.*

PARTNERS.

- 1 Money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied, is proveable as a debt under the commission of the bankrupt partner; although the solvent partner were not called upon to repay the debt to the joint creditor till after the bankruptcy of the other. But the solvent partner may recover from the bankrupt his share of such debt so paid, after the bankruptcy, to the joint creditor, notwithstanding the bankruptcy has obtained his certificate. *Wright v. Hunter*, M. 41 G. 3. 26
- 2 *A.* engages as a partner in a particular transaction with *B.*, *C.*, and *D.*, who were before partners; *B.*, *C.*, and *D.* become bankrupts, after which *A.* pays a debt due from himself, and them to a joint creditor; held that these three partners constituted but one debtor to *A.*, and that he might recover from *B.* the proportion of *B.*, *C.*, and *D.* towards the joint debt; *B.* not having pleaded in abatement. *ib.*
- 3 Two (of three partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor in their joint names: but such security is fraudulent and void as against the third partner, and cannot be recovered in an action against the three, wherein one only of the original partners pleaded to the action. *Shirreff v. Wilkes*, M. 41 G. 3. 1
- 4 *Vide Gregson v. Hulton and another*, B. R. E. 22 (i. 3; and *Marsh v. Vansommer and another*, *Guildhall*, M. 1786. (cited) *ib.* 49
- 5 After an act of bankruptcy committed by one of two partners, joint effects are sent away, which come to the defendant's hands; then the solvent partner dies, leaving the defendant his executor; afterwards a commission of bankrupt is taken out against the surviving partner, and his estate assigned to the plaintiffs: held that they are tenants in common with the solvent partner, and after his decease, with his representatives, by relation of law from the act of bankruptcy, and cannot therefore maintain trover against the defendant claiming under such solvent partner. *Smith v. Stokes*, E. 41 G. 3. 39
- 6 After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt, and dies; and afterwards a commission issues against the surviving partner, held that the creditor, by virtue of such

delivery by the solvent partner, became tenant in common of the goods with the assignees of the bankrupt by relation from the act of bankruptcy which was in the lifetime of the solvent partner; and consequently that the assignees cannot maintain trover against such creditor. *Smith v. Oriell*, E. 41 G. 3. 185

PATRON.

See RESIGNATION BOND, No. 2.

PAYMENT OF MONEY INTO COURT.

The payment of money into court upon a contract stating a special contract is an admission of such contract, and narrows the inquiry to the quantum of damages sustained by the breach thereof. Therefore if the plaintiff declare as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays *5l.* into court, the latter cannot give in evidence that the contract was that he should not be answerable for goods lost to a greater value than *5l.* unless entered and paid for accordingly: though if no money had been paid into court, the plaintiff must have been nonsuited on such evidence. • *Yate v. Willan*, M. 42 G. 3, and *Piggott v. Dunn*, E. 36 G. 3, cited *ib.* 392

PENAL ACTIONS.

- 1 In an action on a penal statute, the declaration must allege the fact to be done *contra formam statuti statutorum*, as the case may be: stating that by force of the statute an action accrued, &c. is not sufficient, where the penalty is given by one statute, and the right of action to the informer is given by another. *Lee v. Clarke*, E. 42 G. 3. 486
- 2 *Semble*, where the record was entitled generally of Hil. 41 G. 3, and the fact was laid under a viz. on 21st of January 1801, whereas the return of the *capias* must have been at latest on 20th January, and so the suit appeared to be commenced before the cause of action, contrary to the averment in the declaration; such repugnancy is no ground of error. *ib.* 486
- 3 *Semble*, if a statute give an action within six months after the fact committed, (by which must be understood lunar months,) and the declaration aver such fact within six calendar months before, it is no error; as it will be presumed that the fact was proved within due time, notwithstanding such irrelevant allegation. *ib.* 486
- 4 *Semble*, that a declaration for a penalty on killing game brought for the whole penalty on the stat. 2 G. 3, c. 19, s. 5, and prior statutes need not allege the fact to have been committed within two terms before the action commenced, according to stat. 26 G. 2, the stat. 2 G. 3, having allowed six months. *ib.* 496
- 5 The stat. 37 G. 3, c. 90, s. 26, requiring a proctor to take out a certificate for practising under a certain penalty, gives no action to

a common informer for the recovery of it; the 6th sect. of that act incorporating the power of suing, &c. given by former statutes, only referring to penalties in respect of duties created by prior sections of that act. *Barnard v. Gosling*, T. 42 G. 3. 593

- 6 It seems, that two proctors may be sued together for not obtaining and entering their certificates, and that one may be acquitted and the other convicted. *ib.* 593
- 7 A joint action may be maintained against several to recover a penalty upon the game laws. *Hardyman v. Whitaker*, M. 22 G. 2, cited *ib.* 595

PLEADING.

See EXCISE. SET-OFF. WAY, No. 2, 3.

- 1 Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed. *Coulanche v. Le Ruez*, H. 41 G. 3. 79
- 2 In an action for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt, and to pay for it according to the terms of the sale, but that the defendant refused to deliver it; without averring an actual tender of the price. *Rawson v. Johnson*, H. 41 G. 3. 110
- 3 In trespass for taking and driving the plaintiff's cattle, to which there was a justification, that the defendant was lawfully possessed of a certain close, and that he took the cattle there damage feasant; the plaintiff may specially reply title in another, by whose command he entered, &c. and it does not vitiate the replication that it unnecessarily proceeded farther to give colour to the defendant. *Taylor v. Eastwood*, H. 41 G. 3. 114
- 4 To a plea of set-off of a sum due under a recognizance, and also of another sum upon a simple contract, it seems that a replication, protesting that the plaintiff did not acknowledge, &c. and then pleading that he was not indebted in manner and form as the defendant had in pleading alleged, and concluding to the country, is bad; inasmuch as it refers matter of record to the cognizance of a jury. But as it was a sham plea, the plaintiff had leave to amend without payment of costs. *Solomons v. Lyon*, E. 41 G. 3. 186
- 5 To a plea in abatement of misnomer of plaintiff, replication that the plaintiff was known as well by the one name as the other: upon demurrer overruled, there must be judgment of respondeas ouster, and not quod recuperet. *Bowen v. Shapcott*, T. 41 G. 3. 265
- 6 In an action against a returning officer for refusing a vote at an election of members

- to serve in Parliament, malice must be proved as well as laid. *Semble* that charging that the defendant knowing, &c. and *wrongfully* intending to deprive plaintiff, &c. hindered him from giving his vote, &c. is a sufficient allegation of malice. *Drewe v. Coulton, Launceston Sp. assizes, 1787. (cited) n.* 274
- 7 To a declaration against one upon joint promises by him and another whom he avers to be outlawed, a plea of nul tiel record of outlawry is in effect a plea in abatement, for want of parties; and therefore if it conclude in bar, it is bad on general demurrer, and the plaintiff is entitled to judgment quod recuperet, &c. *Nowlan v. Geddes, T. 41 G. 3.* 307
- 8 Upon breach of a contract for the purchase of 100 bags of wheat, 40 or 50 of which were to be delivered on one market day, and the remainder on the next market day, the plaintiff cannot decline as upon an absolute contract for the delivery of the 40 bags on the first day, &c. though 40 bags were then in fact delivered; but the contract must be stated in the alternative, according to the original terms of it. *Penny v. Porter, M. 42 G. 3.* 335
- 9 The same where the contract was to deliver goods within 14 days or as soon as a certain vessel arrived. *Shipman v. Saunders, E. 1783, cited* 336
- 10 In an indictment on the stat. 30 G. 2, c. 24, for obtaining money on false pretences, it is sufficient to allege that the defendant unlawfully, knowingly, and *deliberately* pretended so and so, by means of which *said* false pretences he obtained the money; afterwards negating such pretences to be true; though it be not in terms alleged that he *falsely* pretended, &c. and it seems it would have been sufficient to allege that he obtained the money by such and such pretences, averring such pretences to be false. *Rez v. Airey, M. 42 G. 3.* 347
- 11 In justifying a trespass under the process of a foreign court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior courts. But at any rate a plea which only states that the court abroad was governed by foreign laws, that the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question in such court, having competent jurisdiction in that behalf, *et taliter processum*, &c. that the defendant was ordered by the said court, having competent authority in that behalf, to seize the property, is bad: being too general; and not giving the plaintiff notice whether the defendant justified as an officer of the court, or party to the cause; or of what nature the charge was, or by whom instituted. or what the order of seizure was, whether absolute or *quousque*, &c. *Collett v. Ld. Keith, E. 42 G. 3.* 453
- 12 In an action on a penal statute the declaration must allege the fact to be done *contra formam statuti, or statutorum*, as the case may be: stating that *by force of the statute* an action accrued, &c. is not sufficient, where the penalty is given by one statute, and the right of action to the informer is given by another. *Lee v. Clarke, E. 42 G. 3.* 456
- 13 *Semble*, where the record was entitled generally of Hil. 41 G. 3, and the fact was laid under a viz. on 21st January, 1801, whereas the return of the capias must have been at latest on 20th of January, and so the suit appeared to be commenced before the cause of action, contrary to the averment in the declaration; such repugnancy is no ground of error. *Id.* 456
- 14 *Semble*, if a statute give an action within six months after the fact committed, (by which must be understood *lunar* months,) and the declaration aver such fact within six *calendar* months before, it is no error; as it will be presumed that the fact was proved within due time, notwithstanding such irrelevant allegation. *Id.* 456
- 15 *Semble*, that a declaration for a penalty on killing game brought for the whole penalty on the stat. 2 G. 3, c. 19, s. 5, and prior statutes, need not allege the fact to have been committed within two terms before the action commenced, according to stat. 26 G. 2, c. 2, the stat. 2 G. 3, having allowed six months. *Id.* 456
- 16 1 The stat. 26 G. 3, c. 77, s. 13, which enacts that no person shall prosecute "any" action, bill, plaint, or information in any "of the King's courts" for the recovery of any excise penalty, &c. unless prosecuted by the Attorney General or some revenue officer, is confined to the superior courts of record; and therefore an information for a penalty for removing wax candles from the place of manufactory before the duty paid (by s. 10, of the same statute) may be prosecuted before the commissioners of excise by one not averred to be such officer.—2. And the information stating in effect that the candles were home-made candles, seems to be sufficient without expressly naming them *British* candles; the words of the act being "*British* spirits, soap, and candles;" though supposing this would have been a ground for error or appeal in the original information, it is no objection to an information in a collateral proceeding for conspiring to prevent the examination of a witness before the commissioners of excise on such prior information, which is only stated by way of recital in the information for the conspiracy.—3. The same answer applies to an uncertainty (if any) in the charge of the first information recited; in negating the excuse of a prior condemnation, as well as the prior payment of the duty before removal; though that seems proper enough.—4. So the issuing of process against the original defendant, or the joining issue on the information recited, is immaterial as to the charging the offence

- of the subsequent conspiracy.—5 Neither is it necessary, at least in such collateral proceeding, to recite that the original information was prosecuted before the commissioners by name, though it be not averred to have been before three or more of them, according to stat. 1 G. 2, st. 2, c. 16.—6. Neither is it necessary in reciting such prior information averred to have been made within three months after the offence committed, according to stat. 1 W. & M. c. 54, s. 13, also to aver notice thereof to the original defendant within a week, as is directed to be given by the same statute.—7. Where the stat. 7 and 8 W. 3, c. 30, s. 24, enables the commissioners of excise to summon witnesses before them, upon a charge exhibited against another for an offence against the excise laws, and an information in a collateral proceeding recited such summonses to have been duly made; proof of a printed summons distributed and issued in blank by order of the commissioners to their agents, and afterwards filled up by one of them without any special directions from the board is sufficient, although not signed by any of the commissioners, nor issued in their individual names; such having been the constant usage in that respect since the introduction of the excise. *R. v. Stevenon*, E. 42 G. 3. 499
- 17 A declaration on a policy of insurance on a foreign ship need not aver any interest in the assured; though there be no such words as "interest or no interest" in the policy. *Nantes v. Thompson*, E. 42 G. 3. 509
- 18 In a country cause, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the court. *Dimsdale v. Nielson*, E. 42 G. 3. 519
- 19 In a justification of slander, that the defendant named the original author of it at the time, it is not sufficient to allege that the original slanderer used such and such words or to that effect: although in the libel declared on the defendant stated that another had spoken the same slanderous words of the plaintiff, or words to that effect; but the defendant must give the very words used, though it be only necessary to prove same material part of them. *Maitland v. Goldney*, T. 42 G. 3. 528
- 20 Qu. Whether a defendant can by naming the original author justify the publishing in writing slanderous words spoken by such other, especially after knowing that they were unfounded? *ib.*
- 21 In an action on the case in tort for a breach of warranty of goods, the *scienter* need not be charged, nor if charged need it be proved. *Williamson v. Allison*, T. 42 G. 3. 537
- 22 It is not necessary to give a local description to the nuisance in an action for diverting the water of a navigation; and therefore if it be doubtful whether the place where such navigation is stated to lie be laid in the declaration as a venue or as local description, it will be referred merely to venue, and need not be proved to be at such place; but it is sufficient if it be at any other place within the county. *Company of Proprietors of the Mersey and Irwell Navigation v. Douglas*, T. 42 G. 3. 560
- 23 If in an action on the case for a nuisance in erecting a weir, it be described in the declaration to be at *H.* and be proved to be at a lower part of the same water called *T.*, the variance is fatal. *Shawe v. Wingley*, York sum. ass. 1790, cor *Wilson*, J. cited *ib.* 561
- 24 The stat. 17 G. 3, c. 90 s. 6, requiring a proctor to take out a certificate for practising under a certain penalty, gives no action to a common informer for the recovery of it; the 6th section of that act incorporating the power of suing, &c. given by former statutes, only referring to penalties in respect of duties created by prior sections of that act. *Barnard v. Gosling*, T. 42 G. 3. 593
- 25 It seems that two proctors may be sued together for not obtaining and entering their certificates; and that one may be acquitted and the other convicted. *ib.*
- 26 A joint action may be maintained against several to recover a penalty upon the game laws. *Hardyman v. Whiaker*, M. 22 G. 3, cited *ib.* 595

PIRATING.

See COPYRIGHT.

POOR.

See ASSUMPSIT, No. 12. OVERSEERS OF THE POOR. REMOVAL, ORDER OF.

REMOVAL.

The stat. 35 G. 3, c. 101, § 4, which provides that after the passing of the act, no person who shall come into any parish shall gain a settlement by being rated to any tenement under 10l. a-year value, extends to persons who were in the parish at the time of the passing of the act. *R. v. The Inhabitants of Islington*, H. 41 G. 3. 145

POOR RATE.

- 1 Lime works are rateable in the hands of the occupier, though there be risk and expence in this working, and the profits be uncertain. *R. v. The Churchwardens, &c. of Albury*, T. 41 G. 3. 261
- 2 The objects of a charitable foundation in the actual occupation of the alms-house and lands for their own benefit in the manner prescribed by the rules of the institution, and liable to be discharged for any breach of such rules, are rateable in respect of such occupation. *R. v. Munday and others*, Trin. 41 Geo. 3. 284
- 3 A Slate-work (or, as improperly called, a

slate mine,) is rateable to the poor. *R. v. The Inhabitants of Woodland*, H. 42 G. 8. 409

POOR—RATE IN AID.

An order for taxing one parish in aid of another under the stat. 43 Eliz. c. 2, s. 3, held well; although the two parishes, together with others, were incorporated for the maintenance of their poor, with fixed quotas of contribution between each other, under special officers, who were empowered to purchase land for the erection of poor-houses and for a burial ground; there being a proviso in the act in general terms, that nothing therein contained should extend to repeal or lessen the power of justices of the peace "to tax *parishes* in aid of others by virtue of the statute 43 Eliz. as fully as if this act had not been made." *R. v. The Inhabitants of St. Helen, Worcester*, T. 42 G. 8. 524

POWER.

- 1 A power of appointment under a marriage settlement unto and among all or any the child or children of the marriage, for such estates as the husband and wife, or the survivor of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment, reserving to them and the survivor a power of revocation and appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons in tail, &c. remainder to the daughter in fee; all the limitations subsequent to that to the eldest son for life are void, as being an excess beyond the power; and the ultimate remainder dependant upon such intermediate limitations, though made in favour of one of the objects of the power, is also void, and shall not be accelerated by the event of such void intermediate limitations not having taken effect, for want of issue made of the eldest son, &c. to whom the appointment was made. For an appointment not good in its creation will not become so by subsequent circumstances: and such an appointment being by deed cannot be construed cypress, so as to give the sons estates tail, as perhaps might have been the case if the appointment had been by will. *Brudenell v. Elwes*, East. 41 Geo. 8. 219
- 2 Under a power in a will to lease *in possession and not in reversion*, a lease for years executed the 29th of March to the then tenant in possession, habendum as to the arable from the 13th of February preceding, and as to the pasture from the 5th of April, then next, &c. under a yearly rent payable quarterly, on the 10th July, 10th of October, 10th of January, and 10th of April, is void for the whole;

though such lease were according to the custom of the country, and the same had been before granted by the person creating the power. *Doe d. Allan v. Calvert*, E. 42 G. 3. 505

PRACTICE

See ADDITION, No. 1: AMENDMENT. COSTS. PRISONER.

- 1 The Court will discharge a feme covert on common bail, though at the time of the credit given to her by the plaintiff, she mistakenly informed him that her husband was dead; there being no fraud intended. *Pitt v. Thompson*, Mich. 41 Geo. 3. 24
- So where the plaintiff knew that the defendant had a husband living abroad, though under terms of separation from him. *Marck v. Capelli*, Hil. 39 Geo. 3. 25
- 2 A prisoner who is supersedeable, for want of filing a bill against him in time, waives the irregularity by afterwards pleading. *Pearson v. Rawlings*, M. 41 G. 3. 53
- 3 No objection can be made to the insufficiency of an affidavit to hold to bail in not negating a tender of the debt in bank notes, after the bail have justified. *Jones v. Price*, M. 41 G. 3. 55
- 4 Regulation concerning the time for delivering paper books in cases entered for argument; those entered for Friday to be delivered to the Judges on the Tuesday preceding, and those entered for Tuesday on the Saturday preceding; with such marginal notes as are directed by rule of Hil. 36 Geo. 3. Reg. Gen. Trin. 40 Geo. 3. 78
- 5 Service of rules, &c. after 10 o'clock at night, shall not be valid. Reg. Gen. Mich. 41 Geo. 3. 78
- 6 Where plaintiff withdraws his record after entering it for trial, the defendant may have judgment as in case of nonsuit. *Burton v. Harrison*, Hil. 41 Geo. 3. 174
- 7 Where a sham plea was put in to which the plaintiff in reply pleaded ill, he had leave to amend without payment of costs. *Solomons v. Lyon*, E. 41 G. 3. 186
- 8 After party arrested on civil process has been discharged on giving a bail bond to the Sheriff for his appearance at the return of the writ, it is optional in the Sheriff whether he will accept the surrender of the party in discharge of the bail bond before the return of the writ; and therefore though notice of such surrender were given to the Sheriff and the gaoler in whose custody the party then was at the suit of another; after which the gaoler let the party out of custody; yet held that the gaoler was not liable upon his bond of indemnity to the Sheriff, as for an escape in the former suit; for the party was not legally in the custody of the Sheriff or his gaoler merely by virtue of such notice of surrender. *Hamilton v. Wilson*, E. 41 G. 3. 192
- 9 Where a verdict is taken pro forma at the trial, for a certain sum, subject to the

- award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount, without first applying to the Court for leave so to do. *Lee v. Lingard*, E. 41 G. 3. 200
- 9 b But the defendant against whom execution is taken out is not liable to pay interest on the sum awarded; that being in the province of the arbitrator (or a jury) to allow or not in the damages. *ib.*
- 9 c Nor is the defendant liable to pay the Sheriff's poundage, or other fees and costs of the levy. *ib.*
- 10 If the plaintiff's attorney sign judgment, and file the committitur piece with the clerk of the judgments within the second term after trial had and verdict obtained against a prisoner, that is a sufficient charging him in execution within two terms, pursuant to the rule of Court of Hilary, 26 Geo. 3. though the final judgment and the committur be not entered of record by the officer of the Court till the continuance day after such second term; provided such entries be then completed. *Pearson v. Rawlings*, E. 41 G. 3. 202
- 11 Filing and entry of committitur against prisoners. E. 41 G. 3. See PRISONER, No. 4. 204
- 12 Where a defendant, under an order to plead issuably, puts in a sham demurrer to some of the counts in the declaration, and pleads issuably as to the rest, the plaintiff may consider the whole as a nullity, and sign judgment as for want of a plea. *Cuming v. Sharland*, E. 41 G. 3. 204
- 13 No rules entered in the peremptory paper shall be enlarged during the term, or put off from the appointed day, by the consent of counsel, or the attorneys, without leave of the Court. Reg. Gen. E. 41 G. 3. 243
- 14 After conviction on a criminal information, to which objections were taken, the defendant must stand committed pending the consideration of the judgment, unless the prosecutor expressly consent to his standing out on bail. *R. v. Waddington*, H. 41 G. 3. 84
- 15 An affidavit of excuse, however slight, for not proceeding to trial, is sufficient to discharge a rule for judgment as in case of a nonsuit, in a qui tam as well as any other action. *S'one v. Farey*, T. 41 G. 3. 270
- 16 Where the defendant was sued by original in London, the scire facias against the bail must be sued there also: and it does not help the plaintiff who sued out the scire facias in Middlesex, that bail had by mistake been put in there. *Harris and another v. Culbert and another*, T. 41 G. 3. 292
- 17 Where a plaintiff has closed his case in evidence at the trial, and the defendant has entered on his defence, it is discretionary in the Judge whether he will let the plaintiff into other evidence on a collateral point which was not in controversy between the parties, in order to carry a verdict against the merits of the principal question. *Etwards v. Sherrat*, T. 41 G. 3. 293
- 18 A writ of error allowed is a supersedeas in law to all further proceedings in the Court below; and therefore proceedings were set aside with costs for irregularity where the ca. sa. being returnable on a day after the allowance of the writ was returned after notice of such allowance on the same day, and sci. fa. afterwards taken out against the bail. *Miller v. Neubald*, T. 41 G. 3. 319
- 19 Where a defendant residing in town at the issuing of the writ changes his residence permanently to the country, at the distance of above 40 miles from town, before the delivery of the issue, he is entitled to 14 days notice of trial. *Spencer v. Hall*, T. 41 G. 3. 331
- 20 No judgment shall be entered up under a warrant of attorney to confess judgment without such warrant being delivered to and filed by the clerk of the dockets. Reg. Gen. M. 42 G. 3. 396
- 21 Every attorney of B. R. who shall prepare any such warrant of attorney, which is to be subject to any defeazance, shall cause such defeazance, or a memorandum in writing of the substance and effect thereof, to be written on the same. *ib.*
- 22 If the defendant's attorney or his clerk be put in as bail, the plaintiff must except to the bail, and cannot proceed as if the matter were a nullity. *R. v. The Sheriff of Surrey*, H. 42 G. 3. 417
- 23 A defendant in a crown prosecution cannot carry down the nisi prius record to trial by proviso. *R. v. Macleod*, H. 42 G. 3. 426
- 24 If an order of removal be confirmed at the sessions, and both orders be afterwards removed into B. R. by certiorari on a case reserved, and B. R. disapprove of the orders, for want of jurisdiction of the removing magistrates appearing on the face of the original order; B. R. will quash both the orders without remitting the matter back to the sessions to quash the original order, for the purpose of enabling them to give maintenance according to stat. 9 G. 1, c. 7, s. 9. And at any rate they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced. *R. v. The Inhabitants of Moor Critchell*, H. 42 G. 3. 436
- 25 All double pleas must be filed, and not merely delivered to the plaintiff's attorney; though two pleas be pleaded, which separately need only have been delivered. *Harison v. Franco*, H. 42 G. 3. 437
- 26 The court will not quash a defective indictment on the motion of the prosecutor after plea pleaded, before another good indictment be found. *R. v. Dr. Wynn*, H. 42 G. 3. 437
- 27 A rule to bring in the body, tested on the day of the return by the sheriff of capi cor-

- pus, though issued afterwards in the vacation, is irregular. *Rex v. The Sheriff of London*, H. 42 G. 3. 444
- 28 A defendant cannot be taken in execution twice on the same judgment, though he were discharged the first time by the plaintiff's consent, upon an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on. *Blackburn v. Stupart*, H. 42 G. 3. 445
- 29 An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested on bailable process is irregular, and he cannot be holden to special bail thereon. *Davison v. Frost*, E. 42 G. 3. 473
- 30 An objection to a second appointment of overseers of the poor for want of jurisdiction in the magistrates may be disclosed to B. R. on affidavit upon the removal of the appointment thither by certiorari. *R. v. The Inhabitants of Great Marlow*, H. 42 G. 3. 446
- 31 Where a defendant is brought up to receive judgment after conviction, an affidavit by the prosecutor in aggravation, stating that a third person, who refused to join in the affidavit, had informed him that the defendant after the trial had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least without swearing that such third person was under the control or influence of the defendant. *R. v. Pinkerton*, E. 42 G. 3. 497
- 32 After judgment on the defendant for a libel, the court refused to make an order on the prosecutor to deposit the original libellous papers with the officer of the court. *R. v. Cator*, E. 42 G. 3. 498
- 33 In a country cause, if the defendant put in special bail in time, he may plead in abatement, though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the court. *Dimsdale v. Nielson*, E. 42 G. 3. 519
- 34 The court directed the sheriff to refund his poundage which he had retained out of money levied upon an attachment for non-payment of money; there being no practice to warrant it; and referred him to his action if he were supposed to have a right to it under the stat. 23 H. 6. c. 9. *R. v. Palmer*, T. 42 G. 3. 521
- 35 A writ of error allowed, though not returned, is in itself a supersedeas; and may be pleaded by the bail to have been issued and allowed after the issuing and before the return of the ca. sa. against the principal, so as to avoid proceedings against them in scire facias upon the recognizance of bail prosecuted after a return by the sheriff of non est inventus made pending such writ of error. *Sampson v. Brown*, T. 42 G. 3. 523
- 36 Where a rule nisi is obtained in B. R. for the purpose of setting aside an annuity, VOL. I. 80

the several objections thereto intended to be insisted on by counsel at the time of making such rule absolute shall be stated in the said rule nisi. *Regula generalis*, T. 42 G. 3. 593

PREMIUM.

See INSURANCE, No. 1.

PREROGATIVE.

Process sued out by the Crown against a defendant to recover penalties, upon which judgment for the Crown is afterwards obtained, entitles the King's execution to have priority within the stat. 35 Hen. 8. c. 39. § 74, before the execution of a subject, whose execution had issued and been commenced on a judgment recovered against the same defendant, prior to the king's judgment, but subsequent to the commencement of the king's process: the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. *Butler v. Butler*, H. 41 G. 3. 171
Attorney General v. Aldersey, M. 1786, S. P. ib. 172

PRESCRIPTION.

See WAY, No. 2.

PRESSING.

A keelman employed in navigating down the river Tyne to the port of Shields, at the mouth of that river, is liable to be impressed, and cannot afterwards bring himself within the protection of the 13 Geo. 2. c. 17, s. 2, exempting every person, not having before used the sea, who shall bind himself apprentice to serve at sea, from being impressed for three years from such binding. *Ex parte Seftly*, E. 41 G. 3. 229

PRINCIPAL AND FACTOR.

A principal gave notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence drew bills on him, which the factor accepted; and the principal died; and his executors directed the captain of the ship to follow his former orders; who thereupon delivered the ship into the possession of the factor, who sold the same: held that the factor has a lien upon the proceeds, as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his outstanding acceptances not then due. *Hammonds v. Barclay*, H. 42 G. 3. 438

PRISONER.

- 1 A prisoner who is supersedeable, for want of filing a bill against him in time, waives the irregularity by afterwards pleading. *Pearson v. Rawlings*, M. 41 G. 3. 53
- 2 The rule of court of the 4 G. 3. requiring an attorney to be present on behalf of a

prisoner at the time of his executing a warrant of attorney to confess judgment, does not apply to a case where the party was in custody at the time at the suit of a third person. *Smith v. Burlton*, H. 41 G. 8. 127

- 3 If the plaintiff's attorney sign judgment, and file the committitur piece with the clerk of the judgments within the second term after trial had and verdict obtained against a prisoner, that is a sufficient charging him in execution within two terms, pursuant to the rule of court of *Hilary*, 26 G. 8., though the final judgment and the committitur be not entered of record by the officer of the court till the continuance day after such second term; provided such entries be then completed. *Pearson v. Rawlings*, E. 41 G. 8. 202
- 4 Every committitur on a judgment against a prisoner shall be filed with the clerk of the docket on or before the last day of the term, in which the prisoner is charged in execution: and the clerk shall enter the committitur on the judgment roll within four days next after the end of such term, exclusive of the last day of the term; unless the last of such four days be *Sunday*, and then within five days, &c. and in default thereof the prisoner shall be discharged. Reg. Gen. E. 41 G. 8. 204

PRIZE.

- 1 Sentence of condemnation of a prize taken by a *French* privateer and carried into *Spain* by a *French* court sitting there (*Spain* being then a belligerent ally of *France* in the war against *Great Britain*) is valid; and such condemnation proceeding on the ground of the property being enemy's and *British*, is conclusive in an action on a policy against the underwriter by the assured, who had insured it as *Danish*; which in fact it was, *Denmark* being then neutral. *Oddy v. Bovill*, T. 42 G. 8. 549
- 2 An appointment by the Lords of the Admiralty of a captain in the navy to be second commander on board a King's ship is valid by their general authority, to appoint what officers they think proper for the service; although another was appointed to the first command on board the same ship, and notice is only taken of one captain in the book of regulations for the navy. And such second captain is entitled to a captain's share of prize under the king's proclamation. *Waterhouse v. King*, T. 42 G. 8. 565

PROCTORS.

See PENAL ACTION, No. 5, 6.

PROHIBITION.

See WILL, No. 1, 2.

PROMOTIONS, &c.

See P. 450.

PROMOTIONS AND RESIGNATIONS.

- WILLIAM MACKWORTH PRAED, Esq. called Serjeant. 175
- Lord ELDON resigned the Chief Justiceship of the Court of C. B. and appointed Lord High Chancellor: vice Lord Loughborough, who resigned, and was created Earl of Rosslyn. 176
- Sir RICHARD PEPPER ARDEN, Knt. resigned the Rolls, and was appointed Lord Chief Justice of C. B. and created a Peer by the title of Lord Alvauley. 176
- Sir JOHN MITFORD, Knt. resigned the office of his Majesty's Attorney-General, and was elected Speaker of the House of Commons. 176
- EDWARD LAW, Esq. appointed Attorney-General and Knighted. 176
- Sir WILLIAM GRANT, Knt. resigned the office of his Majesty's Solicitor General, and was appointed Master of the Rolls. 176
- The Honorable SPENCER PERCEVAL appointed Solicitor-General 176

QUO WARRANTO,

Information in Nature of.

See CORPORATION.

- 1 It is no objection to relators applying for a quo warranto information against the defendant for exercising the office of an alderman (his election to which they had opposed,) that they afterwards made no opposition to his election to the principal office of magistracy, (to which the other was a necessary qualification;) or that they afterwards attended at and concurred in corporate meetings whereat he presided or whereat he attended in his official character; such application being made within the time limited by law, viz. in 4 years after the defendant's election as an alderman. *Rex v. Clark*, M. 41 G. 8. 35
- 2 It seems that though such an information may be granted on the relation of a stranger to the corporation; yet he ought to make out a very strong case for the interference of the court. *Rex v. Kemp*, H. 29 G. 8. 38
- 3 Upon an information in nature of quo warranto against one for claiming the office of alderman, if he disclaim, and judgment of ouster be given against him, he is concluded from showing to a second information for exercising the same office, that he was duly elected before such first information and judgment of ouster, and that he was afterwards sworn in by virtue of a peremptory mandamus from this court. But *semble*, if the election to the office were good, and only the first swearing in irregular, the first judgment should not have been an absolute judgment of ouster; but either a judgment of *capiatur pro fine* only, for the temporary usurpation, or a judgment of *oustet quousque*, &c. *R. v. Clarke*, M. 42 G. 8. 365
- 4 Where sufficient appears by the affidavits to draw the merits of an election to a corporate office into question, the court will

- grant an information in nature of a quo warranto ; though the fact of the defendant's usurpation no otherwise appeared than by the deponents' swearing to their *information and belief* that the defendant was admitted a freeman, and sworn and inrolled accordingly ; the defendant not denying the fact when called upon by a rule to shew cause. *R. v. Harwood*, H. 42 G. 3. 415
- 5 Information in nature of quo warranto lies for the office of bailiff of a court leet, being a prescriptive officer, having power to summon and select the jury. *R. v. Bingham*, E. 42 G. 3. 474

QUI TAM ACTION.
See PRACTICE, No. 15.

RATE. RATE-POOR.
See POOR RATE.

RECTOR.

- A See RESIGNATION BOND, No. 2.
- A rector may recover in ejectment against his lessee on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the stat. 13 Eliz. c. 20. And the lease to the defendant describing him as doctor in divinity, produced by him at the trial in support of his title, is *prima facie* evidence of his being such as he is therein described to be, so as also to avoid the lease under the stat. 21 H. 8. c. 13. s. 3. *Frogmorton d. Fleming v. Scott*, T. 42 G. 3. 546

REGISTRY.
See SHIP.

REGULÆ GENERALES.
See P. 396. 473.

REMAINDERS.
See CROSS-REMAINDERS.

REMOVAL. (Poor.)

- The stat. 35 G. 3. c. 101. s. 4, which provides that after the passing of the act, no person who shall come into any parish shall gain a settlement by being rated to any tenement under 10l. a-year value, extends to persons who were in the parish at the time of the passing of the act. *R. v. The Inhabitants of Islington*, H. 41 G. 3. 145

REMOVAL, ORDER OF.
See MANDAMUS, No. 4.

- 1 The stat. 35 Geo. 3. c. 101. s. 2, after enabling justices to suspend orders of removal of poor persons, and to order the charges thereby incurred to be defrayed by the pauper's parish, and to direct the charges to be levied by warrant of distress, enacts, that if the party against whom it is issued are out of the jurisdiction of the justice granting the warrant, it shall be indorsed by some other justice within whose jurisdiction they are: this is peremptory upon the latter upon request made. *Rex. v. Kynaston*, Mich. 41 Geo. 3. 72

- 2 Where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; and it is not enough to describe themselves justices of the peace in and for the said county, although the proper county were named in the margin, and were also named last before such description of the justices. *R. v. The Inhabitants of Moor Critchell*, M. 42 G. 3. 864

- 3 If an order of removal be confirmed at the sessions, and both orders be afterwards removed into B. R. by certiorari on a case reserved, and this court disapprove of the orders, for want of jurisdiction of the removing magistrates appearing on the face of the original order; this court will quash both the orders, without remitting the matter back to the sessions to quash the original order, for the purpose of enabling them to give maintenance according to stat. 9 G. 1. c. 7. s. 9, and at any rate they will not admit an application for amending their judgment for quashing both orders made in the term subsequent to the judgment so pronounced. *R. v. The Inhabitants of Moor Critchell*, H. 42 G. 3. 436

REQUESTS—COURT OF.
See JURISDICTION, No. 4.

RENT.

- An action of covenant lies against the assignee of a lessee of an estate for a part of the rent; as in such case the action is brought on a real contract in the respect of the land, and not on a personal contract. And in case of eviction the rent may be apportioned, as in debt or replevin. *Allder*, in covenant against the lessee himself, who is liable on his personal contract. *Stevenson v. Lumbard*, T. 42 G. 3. 596

RESIGNATION BOND.

- 1 A bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron. *Lagh v. Lewis*, E. 41 G. 3. 195
- 2 Held by B. R. that the ordinary of the diocese may not refuse to admit a clerk to a rectory to which he was presented, because he had given a general bond to resign upon the request of his patron: but this judgment was reversed in Dom. Proc. *Bishop of London v. Flycke*, M. 23 G. 3. 239

RETURNING OFFICER.

- In an action against a returning officer for refusing a vote at an election of members to serve in Parliament, malice must be proved as well as laid. Semble that charging that the defendant knowing, &c. and wrongfully intending, &c. to deprive plaintiff, &c. hindered him from giving his vote, &c. is a sufficient allegation of mal-

See. Drowe v. Coulton, Launceston Sp. Assizes, 1787, cor. Wilson, J. 274

REVENUE OFFICERS.

Where the commander of one of the King's armed vessels seized a vessel and cargo at sea, and brought them in the next port on suspicion of smuggling; and after process in the Exchequer the owner obtained an order for re-delivery, under which he obtained only part of the goods from the defendant: the owner cannot maintain trover for the remainder, if the action were brought after three months from the original seizure, though within three months from the order for the re-delivery. *Saunders v. Saunders, E. 42 G. 3.* 450

ROBBERY.

See LARCENY and ROBBERY.

SACRAMENT.

See CORPORATION, No. 1.

SCHOOLMASTER.

See RESIGNATION BOND, No. 1.

SEAMEN.

See PRESSING.

SERVANT.

See MASTER.

SESSIONS.

See OVERSEER OF THE POOR, No. 2.

MANDAMUS, No. 4, 5.

- 1 The sessions have no jurisdiction over the offence of forgery at common law, nor can they take cognizance of it as of a cheat. *Rex v. Gibbs, H. 41 G. 3.* 97
- 2 But it was not denied that they had jurisdiction over cheats in general, and in *Rex v. Brayne, M. 12 G. 1.* and *Rex v. Beale, E. 38 G. 3* the court of B. R. gave judgment as for a cheat or indictments respectively removed from the sessions by certiorari. *ib.*
- 3 To solicit a servant to steal his master's goods is a misdemeanour, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the *soliciting and inciting*. And such offence is indictable at the sessions, having a tendency to a breach of the peace. *R. v. Higgins, M. 42 G. 3.* 337

SESSIONS—ORDERS.

See PRACTICE, No. 5. 24. or REMOVAL, ORDERS OF, No. 2.

SET-OFF.

- 1 In assumpsit for goods sold and delivered, defendant pleaded a set-off of more money due to him from the plaintiff. Replication, that the goods were agreed to be paid for in ready money: which replication was holden bad on demurrer, being no answer to the plea. *Elend v. Karr, E. 41 G. 3.* 188

SETTLEMENT.

See EVIDENCE, No. 11.

SETTLEMENT—EVIDENCE.

- 1 The examination of a soldier touching his settlement, which is made evidence by the mutiny act, must be authenticated before it can be received in evidence, and does not prove itself *prima facie*, though the paper appear to be in the form subscribed by the statute. *Rex v. The Inhabitants of Bilton with Harrowgate, M. 41 G. 3.* 32
- 2 An *ex parte* examination in writing of a pauper, taken on oath before two magistrates, for the purpose of removing him to the place of his settlement, is not admissible in evidence upon an appeal against an order of removal, on the ground of the pauper's having absconded between the notice of appeal and the trial of it before the quarter sessions; although the respondents had used due diligence, but without effect, to procure the attendance of the pauper as a witness, he not having been heard of from the time of his absconding. *Rex v. Nuneham Courtney, E. 41 G. 3.* 187
- 3 A certificate directed to the parish of *A.*, or any other in *C.*, will operate upon delivery to the parish of *B.*, which is also in *C.* By the stat. 8 & 9 W. 3 c. 30, such certificate need not be directed to any particular parish. *Rex v. Lillington, E. 41 G. 3.* 217

— Evidence.

- 4 Where a case from the sessions only stated the bare fact of a pauper's having received relief from the respondent's parish, it was holden that this was not even *prima facie* evidence of a settlement there; since he might have been relieved as casual poor, which the overseers were bound to do if wanted, whether the pauper were settled there or not. *R. v. the Inhabitants of Chadderton, M. 42 G. 3.* 346
- 5 Hearsay evidence of a fact is not to be received upon a question of settlement, though the party who gave the information respecting her own settlement were dead. *ib.*
- 6 Neither the hearsay of a pauper who is dead, nor his *ex parte* examination in writing taken on oath before two magistrates, touching his settlement, are admissible evidence of such settlement. *R. v. The Inhabitants of Perry Frystone, M. 42 G. 3.* 358
- 7 An *ex parte* examination in writing of a pauper touching his settlement cannot be received in evidence of such settlement though he be dead. *R. v. The Inhabitants of Abergwilly, M. 42 G. 3.* 365

SETTLEMENT BY APPRENTICESHIP.

See SETTLEMENT BY HIRING AND SERVICE, No. 3.

- 1 Where the master of an apprentice told him "that he had no further employment for him, and he might go where he pleased;" and the apprentice hearing of

- another master was going to him, and being met by his original master, and asked where he was going, answered that he was going to *U.*, to which the master replied, "he might go there or where he pleased;" held this was not such a particular assent of the original master to the service with *U.* as would enable the apprentice thereby to gain a settlement, though the indentures were not delivered up or cancelled. *R. v. the Inhabitants of Crediton*, M. 41 G. 3. 44
- 2 An apprentice offered his master a guinea "to let him off," to which the master agreed, and was also to give him a suit of clothes when the guinea was paid, but the indentures were not delivered up or cancelled. The guinea not being paid, the indentures still subsisted in law, and a settlement may be gained by serving another master with the consent of the first. The sessions ought properly to find the fact of such consent, and not merely evidence of it: but having found that on application by the apprentice to his original master for leave to serve one *B.* (who would not take him without) the master said "he might go with all his heart," and that it would be "a good thing for him to learn the trade:" this was holden sufficient evidence to warrant the conclusion of the sessions, that the original master had consented to the particular service. *R. v. The Inhabitants of Shebbear*, M. 41 G. 3. 51
- 3 The pauper, an apprentice, being about to marry, told his master that he wished to provide and work for himself, to which the master consented, and said he might do the best he could for himself; but nothing was said about the indentures, and they were not in fact delivered up or cancelled; the pauper afterwards engaged to work with another master, who told the original master that he had got the pauper at work, to which the original master answered, "I am glad of it, he was a bad lad, and I could make nothing of him:" held this was not such a consent to the particular service as would confer a settlement in the parish where the pauper then lived with the second master. *R. v. The Inhabitants of St. Helen Stonegate*, H. 41 G. 3. 146
- 4 A contract under seal, and stamped, to serve another for three years, at so much per week, the master agreeing to learn the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much per day, constitutes an apprenticeship. And at any rate the pauper having served under it for more than a year gained a settlement either as an apprentice; or as a hired servant. *Rez v. The Inhabitants of Rainham*, T. 41 G. 3. 260
- 5 A master stipulating for 4d. out of every 1s. of the earnings of his apprentice is no benefit to him within the stat. of Anne, for which an additional duty is to be paid, being by law entitled to the whole. *R. v.*

The Inhabitants of Wantage, T. 41 G. 3. 363

SETTLEMENT—CERTIFICATE.

- 1 A certificate directed to the parish of *A.* or any other in *C.* will operate upon delivery to the parish of *B.* which is also in *C.* By the stat. 8 & 9 Will. 3. c. 30, a certificate need not be directed to any particular parish. *R. v. Lillington*, E. 41 G. 3. 217
- 2 An appointment of one overseer alone for a township is bad in law; the stat. 13 & 14 Car. 2. c. 12, requiring at least two; and a certificate granted by such overseer is void, and gives no security to the certificated parish against the gaining of a settlement there by the party named therein; such certificate not being made pursuant to the statute 8 & 9 W. 3. c. 30, which requires it to be made "by the churchwardens and overseers, or the major part, or by the overseers, where there are no churchwardens." *R. v. The Inhabitants of Clifton*, H. 42 G. 3. 411
- 3 A person cannot gain a settlement by hiring and service with the son of a certificated man continuing to reside in the certificated parish with his mother after the father's death, as part of her family; though the son were of age, and carried on business for himself; such circumstances not amounting to an emancipation. *R. v. The Inhabitants of Sowerby*, E. 42 G. 3. 460

SETTLEMENT BY ESTATE.

- 1 A pauper having a freehold estate in the parish of *A.* in the occupation of a tenant to whom he had let it, was deemed to gain a settlement by residing thereon 40 days with the licence of his tenant for making some repairs; such residence being considered as equivalent to a residence in any other part of the parish. *R. v. The Inhabitants of Houghton le Spring*, H. 41 G. 3. 130
- 2 A cottage leased for 99 years, determinable on lives, purchased by the pauper's wife before marriage, was in the lifetime of her first husband conveyed by them to a trustee in trust that he should by sale or mortgage raise 10l. (for the benefit of the parish by whom the family had been before relieved to that amount), interest and charges, and after payment of the same, in trust to re-assign the premises. The parties always continued in possession; and it did not appear whether the money were ever paid, or what was the value of the cottage. Held that on the death of the first husband, the pauper who married the widow gained a settlement by residing forty days in the cottage, of which she had retained the possession. *R. v. The Inhabitants of Edington*, H. 41 G. 3. 148
- 3 While the pauper resided in the parish of *B.* a freehold estate descended to his wife and her sisters, as coparceners in the same parish; and in a month after the pauper

and his wife contracted to sell their share, but the conveyance was not actually executed for more than forty days after their title accrued; held that the pauper was thereby settled in *B.*, although the estate during all the time was in the occupation of another. *R. v. The Inhabitants of Dorstone*, H. 41 G. 3. 152

SETTLEMENT BY HIRING AND SERVICE.

- 1 *A.* clubbed with *B.* (which signifies serving another for the purpose of learning a trade) for three years, at a certain rate of weekly wages, with a proviso that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionable deduction of wages, held that *A.* gained a settlement by serving a year under this hiring, though occasional deductions on these accounts were made. *R. v. The Inhabitants of Martham*, H. 41 G. 3. 126
- 2 A pensioner of the *East India Company*, hiring himself as a servant for a year, with a reservation to himself of two days in each half year, when he might go for his pension, cannot gain a settlement by service under such a contract. *R. v. The Inhabitants of Over*, T. 41 G. 3. 291
- 3 A service under a hiring by the week (the servant boarding and lodging himself), nothing being said about Sunday, but the servant working on that day occasionally, when asked by his master, without additional wages, though he sometimes received victuals, may be joined with service under a yearly hiring as a menial servant, so as to confer a settlement by hiring and service for a year. *R. v. The Inhabitants of Sutton*, T. 41 G. 3. 317
- 4 Where a pauper agreed with a weaver to serve him for a year and a half, and the master was to teach him to weave, and the pauper was to have half his earnings, and find himself in every thing; under which contract the pauper served his master for above a year: held that he thereby gained a settlement as by hiring and service; it being the apparent intention of the parties to create the relation of master and servant, and not that of master and apprentice. *R. v. The Inhabitants of Eccleston*, E. 42 G. 3. 469
- 5 A servant hired for a year departed from his master some short time before the end of the year, on ill usage, but received his whole year's wages, and something over: held, that he thereby gained no settlement, he having refused to serve out the year when required by his master. *R. v. The Inhabitants of Corsham*, E. 42 G. 3. 303
- 6 A hiring at so much a week, meat, drink, washing, and lodging, and to part on a week's notice by either party, will not warrant a conclusion of a general hiring; though the servant continued six years with the master, and the wages were raised during the period: and therefore no settle-

ment can be gained under such hiring and service. *R. v. The Inhabitants of Hanbury*, T. 42 G. 3. 526

SETTLEMENT BY OFFICE.

- 1 The sessions finding that the pauper was legally appointed Governor of the Workhouse in *I.* at an annual salary, and that the office of Governor is a public annual office, and that the pauper served it for a year: held that a settlement was thereby gained in *I.* *R. v. Inhabitants of Ilminster*, M. 41 G. 3. 55
- 2 A curate officiating in a parish for above a year, under the bishop's licence to perform the office of curate, at a certain annual stipend, is yet not such an annual officer as is entitled to gain a settlement by virtue of the stat. 3 W. 3. c. 11. s. 6. *R. v. The Inhabitants of Wantage*, M. 42 G. 3. 363

SETTLEMENT BY RATING, &c.

- 1 The stat. 35 Geo. 3. c. 101, which provides, that after the passing of the act, no person who shall come into any parish, shall gain a settlement by being rated to any tenement under 10*l.* a-year value, extends to persons who were in the parish at the time of the passing the act. *R. v. The Inhabitants of Islington*, H. 41 G. 3. 145
- 2 A settlement by being rated and paying rates cannot be proved by evidence of paying only, without the production of the rate, or accounting reasonably for the non-production of it; although the payer was both owner and occupier of the estate for which he paid the rate. *R. v. The Inhabitants of Coppul*, M. 42 G. 3. 345
- 3 An exciseman who was rated for his salary, which was in fact paid by the collector, without any deduction from the salary, does not thereby gain a settlement. *R. v. The Inhabitants of Weobly*, M. 42 G. 3. 265

SETTLEMENT FROM PARENTS.

- 1 A son of age and married, continuing to live with his father, does not follow a settlement subsequently acquired by the father in another parish, to which the son also accompanied him as part in fact of his household. *R. v. The Inhabitants of Ewer-ton*, T. 41 G. 3. 257
- 2 A person cannot gain a settlement by hiring and service with the son of a certificated man, continuing to reside in the certificated parish with the mother after his father's death, as part of her family; though the son were of age and carrying on business for himself; such circumstances not amounting to an emancipation. *R. v. The Inhabitants of Sowerby*, E. 42 G. 3. 460

SETTLEMENT, by taking a Tenement of 10*l.* a-year.

- 1 The renting by a needle-maker of certain runners in another's mill, together with a packeting-room, of all which he had the

exclusive use (a runner being a piece of machinery for scouring needles screwed down to the floor of the mill), the whole being of the annual value of above 10*l*. including the separate value of the runners, is not the taking of a *tenement*, whereby a settlement can be gained. *R. v. The Inhabitants of Tardebigg*, T. 41 G. 3 258

- 2 The occupation of a cottage for 40 days, by the leave of the former tenant, who then went out, under an agreement with him to pay the same rent to the landlord which he had before done, but without any authority from the landlord (the cottage, together with other premises occupied at the same time being 10*l*. a year and upwards), was holden to give the occupier a settlement. *R. The Inhabitants of Aldborough*, T. 41 G. 3. 261

- 1 ——— *By taking a Tenement.*
A contract for a *standing place* in another's mill for a carding machine, (the party's own property,) which was fastened to the floor and the roof, for the purpose of being worked by the steam engine of the mill; for which the party was to give 20*l*. a year, with liberty to quit on giving three months notice, is not a taking of a *tenement*, but a mere licence to use the machinery of the mill; and therefore no settlement can be derived under it. *R. v. The Inhabitants of Mellor*, H. 42 G. 3. 420
- 2 Renting a dairy (including the cows and their pasture) at above 10*l*. a year in value, will not confer a settlement, if the annual value of the *lands* on which the cows were to be depastured were under 10*l*. *R. v. The Inhabitants of Menworth*, H. 42 G. 3. 425

SHAM PLEA.

See PRACTICE, No. 7.

SHERIFF.

After a party arrested on civil process has been discharged, on giving a bail bond to the Sheriff for his appearance at the return of the writ, it is optional in the Sheriff whether he will accept the surrender of the party in discharge of the bail bond before the return of the writ; and therefore, though notice of such surrender were given to the Sheriff, and the gaoler in whose custody the party then was at the suit of another; after which the gaoler let the party out of custody; yet held that the gaoler was not liable upon his bond of indemnity to the Sheriff, as for an escape in the former suit; for the party was not legally in the custody of the Sheriff or his gaoler, merely by virtue of such notice of surrender. *Hamilton v. Wilson*, E. 41 G. 3. 192

SHERIFF'S POUNDAGE.

The court directed the sheriff to refund his poundage, which he had retained out of money levied upon an attachment for non-payment of money; there being no practice to warrant it; and referred him to his action, if he were supposed to have a right

to it under the stat. 23 H. 6. c. 9. *R. v. Palmer*, T. 42 G. 3. 521

SHIP.

See AVERAGE, No. 1.

If a trader become a bankrupt between the time of executing a bill of sale of a ship at sea to the defendant, and the time of the defendant's complying with the requisites of the registry acts of the 26 G. 3. c. 60. and 34 G. 3. c. 68. s. 16.; though such requisites were completed after the act of bankruptcy, and before the action brought, the property does not pass; but the assignees of the bankrupt may recover the possession of such ship in trover. *Moss v. Charnock*, E. 42 G. 3. 516

SLANDER.

- 1 In a justification of slander, that the defendant named the original author of it at the time, it is not sufficient to allege that the original slanderer used such and such words or to that effect; although in the libel declared on, the defendant stated that another had spoken the same slanderous words of the plaintiff, or words to that effect; but the defendant must give the very words used, though it be only necessary to prove some material part of them. *Maitland v. Golden*, T. 42 G. 3. 528
- 2 Qu. Whether a defendant can, by naming the original author, justify the publishing in writing slanderous words spoken by such other; especially after knowing that they were unfounded. *ib.*

SOLDIER.

- 1 The examination of a soldier, touching his settlement, which is made evidence by the mutiny act, must be authenticated before it can be received in evidence, and does not prove itself *prima facie*, though the paper appear to be in the form prescribed by the stat. *R. v. The Inhabitants of Bilton*, M. 41 G. 3. 23
- 2 Semble the hand-writing of the Magistrate signing the examination ought at least to be proved. *ib.*

STAMP.

- 1 A promissory note, written upon a stamp of greater value than the proper stamp required, cannot be received in evidence, though the stamp were applicable to the same kind of instrument. *Farr v. Price*, M. 41 G. 3. 43
But if there were a money consideration moving between these parties for the note, parol evidence may be given of it, so as to enable the plaintiff to recover on the money counts. *Tyte v. Jones*, sittings at Westminster 1788, cor. Lord Kenyon. (cited) *ib.*
- 2 A draft on a banker, post dated and delivered before the day of the date, though not intended to be used till that day, requires to be stamped by the stat. 31 G. 3. c. 25. *Allen v. Keeves*, E. 41 G. 3. 216
- 3 Where the plaintiff entered an account in

writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such acknowledgment in writing cannot be given in evidence *per se*, in respect to the cash items, amounting to above 40s. in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove, that upon calling over each article to the defendant, he admitted that he had received the same: and the witness may refresh his memory by referring to the account. *Jacob v. Lindsay*, E. 41 G. 3. 227

4 An indorsement on an annuity deed, containing a clause of redemption, if made subsequent to the execution of it, must be stamped, otherwise it cannot be received in evidence. *Schumann v. Weatherhead*, T. 41 G. 3. 268

5 A master stipulating for 4d. out of every 1s. of the earnings of his apprentice is no benefit to him within the statute of *Anne*, for which an additional duty is to be paid, being by law entitled to the whole. *R. v. Inhabitants of Wantage*, T. 41 G. 3. 292

STAMPS.

The proper stamp for a promissory note of 45l. is 1s. 6d. composed of three different sums applicable to different funds under three acts of parliament. But such a note on a 2s. stamp composed of three different sums applicable to the same funds, though in larger proportions to each than was required, was holden valid. *Taylor v. Hague*, T. 42 G. 3. 522

STATUTE.

By s. 1. of stat. 39 & 40 G. 3. c. 104, the jurisdiction of the Court of requests in *London* is enlarged from debts of 40s. to 5l. from the 30th September 1800; and by s. 12., if any action *shall be commenced* in any other court to recover any debt not exceeding 5l. within the jurisdiction, the plaintiff shall not recover any costs, &c. held that the words "*shall be commenced*" must by necessary construction be restrained to the date of the 30th September, and not to the passing of the act, which was on the 9th of July preceding. *Whitborn v. Evans*, M. 42 G. 3. 396

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STOCK.

- 1 An agreement to pay a per centage upon the day on which any money should be received by the defendant through the means of the plaintiff's information does not entitle the plaintiff to the stipulated reward upon the transfer of stock, in consequence of such information; although he might afterwards receive the dividends thereon. *Jones v. Brinley*, M. 41 G. 3. 17
- 2 Quere as to the dividends received which were due at the time of the transfer. *ib.*
- 3 In estimating the measure of damages in an action for breach of an engagement to replace stock on a given day, it is not enough to take the value of the stock on

that day if it have risen in the mean time; but the highest value as it stood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time while the market was rising. *Shepherd v. Johnson*, H. 42 G. 3. 430

STOPPING IN TRANSITU.

- 1 One who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account and at the risk of his principal, though unknown to the carrier, cannot recover his lien by stopping the goods in transitu, and procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage. *Sweet v. Pym*, M. 41 G. 3. 18
- 2 A delivery by the consignor of goods on board a ship chartered by the consignee is a delivery to him, and the consignor cannot afterwards stop them in transitu. But where the delivery was made on board such a ship in *Russia*, and by a law of that country, the owner of goods, in case of the bankruptcy of the vendee, may sue out process to retake his goods on board a ship, &c. and retain them till payment; and the owners hearing of the insolvency of the vendee, applied to the Captain on board of whose ship the goods had been delivered, to sign the bills of lading to their order, which he complied with, without the necessity of suing out process: held that this was a substantial compliance with such law, and that the Captain, on his arrival here, was bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee, who had become bankrupt. *Ingles and others, assignees of Crane v. Usherwood*, T. 41 G. 3. 252

SUPERSEDEAS.

- A writ of error allowed, though not returned, is in itself a supersedeas; and may be pleaded by the bail to have been issued and allowed after the issuing and before the return of the ca. sa. against the principal, so as to avoid proceedings against them in scire facias upon the recognizance of bail prosecuted after a return by the sheriff of *non est inventus* made pending such writ of error. *Sampson v. Brown*, T. 42 G. 3. 533

TENANT.

See LANDLORD.

TENANT IN COMMON.

See BANKRUPT, No. 6 and 7, or PARTNER, No. 3 and 4.

- One tenant in common levying a fine of the whole, and taking the rents and profits afterwards without account for nearly five years is no evidence from whence the jury should be directed (against the justice of the case) to find an ouster of his companion at the time of the fine levied; and consequently the latter may maintain ejectment without making an actual entry. *Peacocks*

Mo d. Hornblower v. Read and Another,
T. 41 G. 3. 277

TRADING WITH ENEMY.

See INSURANCE, No. 1.

- 1 It is legal to trade with the subjects of an enemy's country by the King's licence. But if it be provided in such licence, that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond being given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods. *Vandyck v. Whitmore*, E. 41 G. 3. 233
- 2 If a licence to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient that the goods were shipped before the expiration of the time, the ship not sailing till afterwards. *ib.*
- 3 Where an act prohibiting intercourse with America, then in a state of rebellion, enabled the British Commanders to grant licences in a certain form to carry provisions to places in America occupied by the British, and a licence was granted not following the requisitions of the act, it was held void; and consequently the trading being illegal, the goods sent under the licence could not be insured. *Vanhartals v. Halbad*, M. 31 G. 238

TRESPASS.

See WAY, No. 1.

LANDLORD AND TENANT, No. 1. PLEADING, No. 11.

- 1 A master is not liable in trespass for the wilful act of his servant, by driving his master's carriage against another, done without the direction or assent of the master. But he is liable to answer for any damage arising to another from the negligence or unskillfulness of his servant acting in his employ. *M'Manus v. 'Crickell*, Mich. 41 Geo. 3. 67
- 2 Trespass lies against a landlord, who, on making a distress for rent, turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress. *Eiherton v. Popplewell*, H. 41 G. 3. 82
- 3 The trespass for taking and driving the plaintiff's cattle, to which there was a justification that the defendant was lawfully possessed of a certain close, and that he took the cattle there damage feasant, the plaintiff may specially reply title in another, by whose command he entered, &c. and it does not vitiate the replication that it unnecessarily proceeded farther to give colour to the defendant. *Taylor v. Eastwood*, H. 41 G. 3. 114
- 4 One in possession of glebe land under a lease void by the stat. 13 Eliz. c. 20, by reason of the rector's non-residence, may yet maintain trespass upon his possession

against a wrong doer. *Graham v. Peal*, H. 41 G. 3. 128

- 5 To trespass for breaking and entering, &c. and pulling down and taking away certain buildings, &c. The defendant as to the breaking and entering suffered judgment by default, and pleaded not guilty as to the rest. Held that such plea was sustained by shewing that the building taken away, which was of wood, was erected by him as tenant of the premises on a foundation of brick for the purpose of carrying on his trade, and that he still continued in possession of the premises at the time when, though the term was then expired. *Penton v. Robart*, M. 42 G. 3. 374

TRIAL—BY PROVISIO.

- 1 A defendant in a crown prosecution cannot carry down the *nisi prius* record to trial by proviso. *R. v. Macleod*, H. 42 G. 3. 426
- 2 General note on the trial by proviso. And *quare* as to prosecutions by private persons. *ib.* 427

TROVER.

See BANKRUPT, No. 6 and 7, or PARTNER, No. 3 and 4.

- Where the commander of one of the King's armed vessels seized a vessel and cargo at sea, and brought them into the next port on suspicion of smuggling; and after process in the Exchequer the owner obtained an order for re-delivery, under which he obtained only part of the goods from the defendant; the owner cannot maintain trover for the remainder, if the action were brought after three months from the original seizure, though within three months from the order for the re-delivery. *Saunders v. Saunders*, E. 42 G. 3. 450

USURY.

- 1 A bill of exchange payable to A. or order, which was legal in its inception, was by him indorsed to B. for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to B.'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate: held that the indorsement of A. to B. on an usurious account did not avoid the bill in the hands of an innocent holder by virtue of the statute of usury: and that B.'s assignees, being clothed with the rights of such innocent indorsee, were entitled to hold the bill against A., though as between A. and B. the security was void. *Parr v. Eltason*, M. 41 G. 3. 60
- 2 An agreement on discounting a bill, that the party should take in part payment another bill which had time to run as cash, although the full discount is taken, is usurious. *ib.*

- 3 Upon a contract to forbear 600*l.* for a year, reserving interest at the rate of 5*l.* per cent. for which a premium was paid in the first instance, the usury is complete upon the lender's receiving any part of the growing interest within the year. *Wade q. t. v. Wilson*, H. 41 G. 3. 107
- 4 The contract may be laid as for a forbearance to *A.* alone, who was the real debtor, although *B.* had joined with him in the security given to the lender. *ib.*
- 5 If *A.* be indebted to *B.* and *B.* to *C.* and *C.* agree for an usurious consideration to accept *A.* for his debtor instead of *B.*; this may be laid to be for an usurious loan of so much from *C.* to *A.* *ib.*

VARIANCE.

See EVIDENCE, No. 12. PLEADING, No. 8, 9, 16, 22.

VENDOR AND VENDEE.

See STOPPING IN TRANSITU.

VENIRE.

See MANDAMUS, No. 2.

Though by the stat. 9 Ann. c. 20, § 2, the prosecutor of a mandamus to which there is a return, and issue taken on the facts therein, had an option to try the question in the same county in which he might have brought an action for a false return; yet if all the material facts are alleged in one county, and issue taken thereon there, he cannot issue the venire facias into another county, though he might originally have alleged the fact there, and have there brought his action for a false return. *Rex v. The Mayor &c. of Newcastle*, Mich. 41 Geo. 3. 70

VERDICT.

See AWARD, No. 2.

VICTUAL.

See FORESTALLING, No. 20.

VERDICT.

A verdict against one defendant in trespass upon an issue of a justification of a public right of way, negating such right, is evidence in trespass for breaking and entering the same close against another defendant who justified under the same right; and the latter cannot shew that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial; the record being conclusive as to the fact of such a finding, though not as to the truth of it between other parties. *Reed v. Jackson*, E. 41 G. 3. 179

WARRANT OF ATTORNEY.

1 The rule of Court of the 4th G. 2, requiring an attorney to be present on behalf of a prisoner at the time of his executing a warrant of attorney to confess judgment, does not apply to a case where the party was in

custody at the time at the suit of a third person. *Smith v. Burlington*, H. 41 G. 3. 127

WARRANTY.

- 1 Upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given. And therefore if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part, (but arising from the fraud of the grower from whom he purchased) such seller is not answerable, though the goods turned out to be unmerchantable. *Parkinson v. Lee*, E. 42 G. 3. 477
- 2 In an action on the case in tort for a breach of a warranty of goods sold the *scienter* need not be charged, nor if charged need it be proved. *Williamson v. Allison*, T. 42 G. 3. 537

WARRANT OF ATTORNEY TO CONFESS JUDGMENT.

See PRACTICE, No. 20, 21.

WAY.

- 1 An order made by Justices of Peace, under the stat. 13th G. 3. c. 78. § 19, for stopping up an old foot way and setting out a new one, must follow the form prescribed in the schedule annexed to the act, and set forth the length and breadth of the new footway, otherwise it is no answer to a justification of a right of way pleaded to an action of trespass, *quare clausum fregit*, brought by the owner of the soil over which the old way led. The statute requires that the form set "forth in the schedule" *"shall be used on all occasions, with such additions and variations only as may be necessary to adapt it to the particular exigency of the case."* Under these words a material variance from the form prescribed is fatal, and may be taken advantage of in a collateral proceeding. *Davison v. Gill*, M. 41 G. 3. 47
- 2 A claim of a prescriptive right of way from *A.* over the defendant's close unto *D.* is not supported by proof that a close called *C.*, over which the way once led, and which adjoins to *D.* was formerly possessed by the owner of close *A.* and was by him conveyed in fee to another, without reserving the right of way; for thereby it appears that the prescriptive right of way does not, as claimed, extend unto *D.*, but stops short at *C.*—*Quere*, if the claim had been for a prescriptive right of way over the defendant's close towards *D.* *Wright v. Rattray*, E. 41 G. 3. 159
- 3 But where in trespass *qu. cl. fr.* the defendant prescribed for an occupation way from his own close "unto through and over" the locus *in quo* to and unto a certain highway, &c. such plea may be sustained, though it appeared that one out of several intervening closes was in the possession of the defen-

14 dant himself. *Jackson v. Shillito*, T. 32
G. & C. B. 489

WILL.

See DEVISE.

- 1 Prohibition lies to the Spiritual court if a suit be instituted to obtain a *general* probate of the will of a woman made during her coverture, though with her husband's consent and though she *survived* him; for he could not by any assent of his enable her to dispose by any will made during the coverture of property which she might acquire after his death, but only of property over which he himself had a disposing power. *Scammel v. Wilkinson*, T. 42 G. 3. 585
- 2 But a feme covert may make a will disposing of property which she only has in *autre droit*, as executrix, without her husband's consent. *ib.*

Revocation.

- 1 One devised his personal estate to *A.* and his real estate to *B.*, and after *A.*'s death, the deviser having acquired other real property, some by devise and some by purchase, he made a second will, disposing by name of his after acquired testamentary estate to *C.* and then added, "*As to the rest of my real and personal estate, I intend to dispose of it by a codicil, hereafter to be made by this my will.*" This is no revocation of the first will, whether considering that he meant to include the same property therein devised; because it is a mere declaration of an intent to dispose of it in future; and non constat that such disposition would be inconsistent with the first will: nor is ~~any~~ revocation, considering that he meant only to include his after-purchased property not before devised, and his personal estate, the bequest of which had lapsed by the death of *A.* *Thomas d. Jones and others v. Evans*, T. 42 G. 3. 556
- 2 *A.* by will provided an annuity for *B.* with whom he cohabited, and directed his trustee and executor out of his real estate, *in case he should have any child or children by B.*, to raise 3000*l.* to be paid to and amongst his *said children*, and devised the

remainder of his estate over to several of his relatives. Afterwards he married *B.*, and had several children by her. Held that such subsequent marriage and births did not revoke his will; the objects having been therein contemplated and provided for. *Kenebel v. Scrafton*, T. 42 G. 3. 575

- 2 *Qu.* Whether such implied revocations may be rebutted by evidence of parol declarations of the testator made after the events that he meant his will to stand. *ib.*

WITNESS.

- 1 If several be charged with the same offence, and no evidence be given on the part of the prosecution against one of them, he is entitled to an acquittal before the others are called upon for their defence, in order to enable them to avail themselves of his testimony as a witness. The case of the mutineers of his Majesty's ship *Bounty*. (cit-ed.) 159
- 2 An indorser on a note, who has received money from the drawer to take it up, is a competent witness for the drawer, in an action against him by the indorser, to prove that he had satisfied the note; being either liable to the plaintiff on the note if the action were defeated, or to the defendant for money had and received if the action succeeded. And his being also liable in the latter case to compensate the defendant for the costs incurred in the action by such non-payment makes no difference. *Burt v. Kershaw*, T. 42 G. 3. 542
- 3 A parishioner having rateable property in the parish, but omitted to be rated for the purpose of making him a witness upon a question of settlement between two parishes is a competent witness for the parish in which he is so liable to be rated. *R. v. The Inhabitants of Kirdford*, T. 42 G. 3. 588
- 4 So such an one is a good witness to extend the boundaries of his parish on a question of boundary between two adjoining parishes. *Deacon v. Cook*, Taunton, Sp. Ass. 1789, cited *ib.* 590
- 5 *Aliter*, if he were actually rated at the time. *ib.*

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